90-315

No. 90-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

IN RE VICTOR E. MURGO AND JOSEPH LA SPESA

PETITION FOR WRITS OF MANDAMUS AND PROHIBITION TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Are a defendant's Sixth Amendment right to effective assistance of counsel and Fifth Amendment right to due process violated when a court of appeals requires his newly retained counsel to prepare an appellate brief without first determining whether numerous omissions from the transcript and record are "substantial and significant" pursuant to circuit case law?

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Petitioners respectfully pray that writs of mandamus and prohibition issue to the United States Court of Appeals for the Eleventh Circuit, (1) prohibiting the Court of Appeals for the Eleventh Circuit from requiring petitioners to file appellate briefs in *United States vs. Murgo, et al.*, No. 85-3131 until either all missing transcripts and exhibits are found or the Court of Appeals makes a determination that the missing portions of the Record are not "substantial and significant", and (2) ordering the Court of Appeals first to allow counsel to file objections to the Hon. Walter E. Hoffman's Report on Limited Remand (7/28/89) regarding the omissions from the Record and then to decide whether the cases must be summarily reversed. In the event the Court of Appeals concludes that the cases should not be reversed due to the omissions in the Record, the Court of Appeals should make findings of fact and conclusions of law regarding the omissions upon which counsel can rely in preparing their briefs.

The actions of the Court of Appeals which this petition seeks to remedy raise important Sixth and Fifth Amendment questions with respect to whether a court of appeals can require a newly retained appellate counsel to brief a case in the absence of a complete transcript without causing him to render ineffective assistance of counsel.

THE OPINIONS BELOW

The Orders and Memoranda of the Court of Appeals for the Eleventh Circuit, review of which is sought by this petition, are set forth fully in Appendix A. The Orders and Memoranda of the district court relevant to the petition are set forth fully in Appendix B.

JURISDICTION

This Court has jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a), to confine the Court of Appeals for the Eleventh Circuit to the proper exercise of its jurisdiction in criminal cases within the limitations imposed by the Sixth and Fifth Amendments to the Constitution. In addition, this Court has jurisdiction under Section 1651(a) to exercise general supervisory control over inferior federal courts. *Will vs. United States*, 389 U.S. 90, 107 (1967) (writ serves a "vital and didactic function"); *Schlagenhauf vs. Holder*, 379 U.S. 104 (1964); *LaBuy vs. Howes Leather Company*, 352 U.S. 249 (1957). Such exercise of the Court's supervisory authority is particularly appropriate where, as here, the inferior court has taken action which undermines important constitutional protections afforded the citizens regarding their rights to effective assistance of counsel.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution, which states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

The Fifth Amendment to the Constitution, which states in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

QUESTION PRESENTED

Are a defendant's Sixth Amendment right to effective assistance of counsel and Fifth Amendment right to due process violated when a court of appeals requires his newly retained counsel to prepare an appellate brief without first determining whether numerous omissions from the transcript and Record are "substantial and significant" pursuant to circuit case law?

STATEMENT OF THE CASE

This petition arises out of a criminal prosecution in the United States District Court for the Middle District of Florida, Orlando Division, before Senior Judge Walter E. Hoffman, sitting by designation. Petitioners, international financial advisors, were acquitted on charges of conspiracy and mail fraud, when Judge Hoffman granted petitioners' Rule 29 Motion for Judgment of Acquittal notwithstanding the guilty verdicts returned against the petitioners by the jury.

The government did not appeal the acquittal. Instead it filed a Motion for Reconsideration in which it asked

that the convictions be reinstated or that a new trial be granted.

In an order dated July 7, 1983, the trial judge agreed to reconsider his order of acquittal.

More than a year later, on August 20, 1984, Judge Hoffman announced he was reinstating the jury verdicts and entering judgments of guilty.

On February 23, 1985, more than two years after their trial, Mr. Murgo and Mr. La Spesa were sentenced to seven and four years respectively in the custody of the Attorney General. Appeal bonds were granted.

Shortly after sentencing newly retained appellate counsel for Mr. Murgo timely filed an Appeal Information Sheet requesting "[a]ll transcribed proceedings between 6/12/82 and 2/23/85."

The record was not certified as complete until April 3, 1986, more than one year after sentencing.

According to the Eleventh Circuit Clerk's Office, the delay in preparation of the transcript was caused by one of the court reporters, Ms. Karen Calvacca, who failed to timely complete her portion of the trial transcript. Interestingly enough, Ms. Calvacca, at the time she was working on the transcripts, married Stephen Calvacca, the Assistant United States Attorney to whom this case had been assigned after the departure of the two government attorneys that had originally tried the case.

In reviewing the Record, once it was certified as complete, counsel determined that at least four volumes

of transcripts were missing from the Record. The briefing schedule was delayed while a search was made for the transcripts.

Although these four transcripts were found, by August 1, 1986, counsel discovered seven more missing transcript portions as he continued to read the Record. The briefing schedule was again delayed while the Clerk's Office attempted to locate the missing transcript portions.

Meanwhile as counsel continued to read the Record he discovered an additional four transcript portions which were missing. These were immediately reported to the Eleventh Circuit Clerk's Office on August 4, 1986.

On September 17, 1986, counsel moved to stay the proceedings pending completion of the Record. By this time counsel was able to specifically identify twelve transcript portions that were missing from the Record.

The Eleventh Circuit Clerk's Office verified that the transcripts were indeed missing from the Record. The Eleventh Circuit then granted the stay and sent the case back to the Clerk's Office for the Middle District of Florida on limited remand. *See* Appendix A at A-2.

The district court clerk's office was able to locate only one of the twelve missing transcript portions despite its best efforts over the more than one year it had the case on limited remand. In fact it discovered that not only transcript portions but also a number of trial exhibits were missing.

In January, 1988, counsel for Mr. Murgo filed a Motion for Summary Reversal with the Eleventh Circuit

due to the state of the Record. In support of his motion, Mr. Murgo relied on *Hardy vs. United States*, 375 U.S. 277 (1964) which held that, where as here, new counsel represented defendants on appeal, counsel must have access to a complete transcript of the trial.

After looking into the matter for almost a year, the Eleventh Circuit agreed that some portions of the trial proceedings were missing from the Record and issued an order denying the Motion for Summary Reversal, but remanding the case to the Middle District of Florida for an evidentiary hearing. The district court was ordered to:

> . . . make findings identifying the portions of the record which are missing. The district court shall also conduct appropriate proceedings with a view to reconstructing of any missing portions of the record pursuant to Fed.R.App.P. 10(c) and 10(e).

See Appendix A at A-5.

A hearing was held before Judge Hoffman in Orlando, Florida, on February 24, 1989.

As a result of this hearing Judge Hoffman issued a 40 page Report on Limited Remand in which he found that the following were omitted from the Record and could not be found: (1) Testimony of Joseph Beaulieu on January 12, 1983; (2) Testimony of Alex Feinman on January 17, 1983; (3) Testimony of Richard Donais on February 15, 1983; (4) Testimony of Elaine Bradley on February 18, 1983; (5) Testimony of Herbert Williams on March 14, 1983; (6) Transcript of responses by Judge Young to a number of questions from the jury. (The Honorable George C. Young took over for Judge Hoffman when

Judge Hoffman had to leave town to attend a judicial conference while the jury was deliberating); (7) Stephen Sarault's Exhibit No. 7; and (8) Government's Exhibit 701. *See* Appendix B at B-15.

Judge Hoffman found that only the testimony of Williams constituted a "substantial and significant" omission from the Record. Accordingly he recommended that a new trial be granted to Mr. Murgo on the two counts directly affected by Mr. Williams' testimony—counts IV and V. *See* Appendix B at B-36.

With regard to the rest of the missing transcripts and exhibits the judge relies on his recollection of their content. These recollections are sometimes in line with the government's summaries and sometimes not. *See* Appendix B at B-23, 31, 35, 48.

Upon receiving Judge Hoffman's Report on Limited Remand, Mr. Murgo's counsel immediately called the Clerk of the Eleventh Circuit, Miguel Cortez, and asked the proper procedures for objecting to the Report since the case was technically with the Court of Appeals, having been sent to the district court on limited remand.

Counsel was told by Mr. Cortez to do nothing and stand by for instructions from the Court. Accordingly, on September 5, 1989, the Clerk rescinded the briefing schedule and stated in a memorandum to counsel: "Counsel will be advised at a later date of any further requirements from the court." *See* Appendix A at A-26.

Then, without allowing counsel to file any objections to the Report on Limited Remand, the Eleventh Circuit

on February 15, 1990, ordered that the briefing schedule begin and that the missing transcripts issue be raised as part of the greater appeal. *See* Appendix A at A-27.

Counsel for Mr. Murgo then filed a Motion for Reconsideration, pointing out that portions of the Record were still missing and that he considered the omissions significant and substantial, and that he wished to have an opportunity to challenge Judge Hoffman's findings before briefing the case.

Counsel named specific appellate issues such as sufficiency of the evidence and severance that he could not brief in the absence of a complete Record. Counsel for Mr. Murgo also asked that the briefing schedule be enlarged as did Mr. La Spesa.

The Eleventh Circuit denied counsel the opportunity to file objections prior to briefing the case, but did enlarge the briefing schedule. *See* Appendix A at A-30.

Petitioners contend that the Eleventh Circuit's refusal to allow the filing of objections and failure to resolve the issues regarding the missing transcripts is a violation of Fed.R.App.P. 10(e) and an abuse of its discretion.

REASONS FOR GRANTING THE WRITS

THE RELIEF SOUGHT BY PETITIONER IS NOT AVAILABLE FROM ANY OTHER COURT

In his Motion for Reconsideration of the February 15th Order of the Court, petitioner Murgo has already sought from the Eleventh Circuit Court of Appeals relief similar to that sought here. However, that court has denied petitioner relief without opinion or explanation.

Without this Court's intercession, petitioners will be required to submit appellate case briefs in which they will be unable to set forth their legal arguments because of gaps in the Record. Furthermore, most of the brief will be consumed attacking the findings of fact and conclusions of law in the district judge's 40 page Report on Limited Remand.

There is no forum other than this Court, and no procedure other than this petition, by which petitioners can seek to remedy the extraordinary violations of their constitutional rights they are being forced to endure.

A COURT OF APPEALS MAY NOT REQUIRE NEWLY RETAINED APPELLATE COUNSEL TO PREPARE APPELLATE BRIEFS WITHOUT FIRST DETERMINING WHETHER NUMEROUS OMISSIONS FROM THE TRANSCRIPT AND RECORD ARE "SUBSTANTIAL AND SIGNIFICANT" PURSUANT TO CIRCUIT CASE LAW.

In its order of limited remand the Eleventh Circuit verified that the trial record in this case was incomplete and that a new trial might need to be granted. *See* Appendix A at A-6. After an evidentiary hearing before the district judge who originally tried this case, the judge reported that six transcript portions, as well as two exhibits, remained missing and could not be found. *See* Appendix B at B-15.

Petitioners' appellate counsel did not represent them at trial nor did they attend or participate in any portion of the trial.[1] Therefore petitioners counsel must rely entirely

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[1] Petitioner La Spesa's original appellate attorney, Mr. Allen Melton, was Mr. La Spesa's original trial attorney, but was replaced when the trial began by Mr. Elmo Hoffman. Mr. Melton was present only briefly during the trial and at no time at issue with regard to the missing transcripts and exhibits. Mr. Melton was replaced on appeal earlier this year by C. Gregory Shamoun. This substitution was not made to gain tactical advantage with regard to the present situation.

Petitioner Murgo's appellate attorney assisted trial counsel Joseph Rosier at sentencing but was not present at any portion of the trial. Petitioner Murgo's sole attorney on appeal is and always has been Jake Arbes. Mr. Rosier was hired only for the trial and never entered an appearance for Petitioner Murgo in the Court of Appeals. Petitioner Murgo and Mr. Rosier are currently at odds due to a financial dispute over trial fees.

on the transcript and Record in attempting to discover errors which may have been committed at trial.

Section 753(b) of the Court Reporter Act, 28 U.S.C.A. Section 753(b), requires that a verbatim transcript be made of "all proceedings in criminal cases had in open court." This language is clear, and its requirements are mandatory. *See, e.g., United States vs. Upshaw*, 448 F.2d 1218, 1223 (5th Cir. 1971).

In the present case it is not clear whether the missing transcripts were made and then lost or whether they were never made in the first place. For purposes of this case it really does not matter since this Court in *Hardy vs. United States*, 357 U.S. 277 (1964) held that, where new counsel represented a defendant on appeal, counsel must have access to a complete transcript of the trial. In *Hardy* the Court stressed that the duty of representation of an appellate attorney included the duty to search out plain error, and that nothing less than a complete transcript would suffice to accomplish this.

Following *Hardy*, the former Fifth Circuit, in decisions which are controlling authority in the Eleventh Circuit,[2] has reversed convictions in several cases where there were omissions in the transcripts and where the appellants had new counsel on appeal. In *United States vs. Gregory*, 472 F.2d 484 (5th Cir. 1973), there was no transcript of the voir dire proceedings nor of the opening and

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[2] Holdings of the Fifth Circuit prior to the split of that circuit into the present Fifth and Eleventh Circuits are binding on the Eleventh Circuit. *See Bonner vs. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

closing statements. In *United States vs. Garcia-Bonafascio*, 443 F.2d 914 (5th Cir. 1971), the transcript omitted the government's closing argument, to which the defendant had objected at the trial. In *United States vs. Rosa*, 434 F.2d 964 (5th Cir. 1970) and *United States vs. Atilus*, 425 F.2d 816 (5th Cir. 1970), there were no records whatsoever of the trial proceedings.

In *United States vs. Upshaw*, 448 F.2d 1218 (5th Cir. 1971) the sole omission in the transcript was of the closing arguments of defense counsel. There, three co-defendants had been tried together. There was no showing that objections to any of the statements had been made at the trial. But, on appeal counsel for one of the defendants raised the possibility that trial counsel for the other defendants might have made prejudicial statements in the course of their closing arguments. The Court reversed, stating that to affirm a conviction in such circumstances "the court must be able to say affirmatively that no substantial rights of the appellant were adversely affected by the omissions from the transcript; that is, it must exclude the possibility of error other than harmless error." *Id.* at 1224.

Despite the holdings in the above-cited cases, the Eleventh Circuit has not chosen to adopt a *per se* rule requiring reversal for any and all omissions. Instead, the Eleventh Circuit has applied one of two standards, depending on whether or not the defendant is represented on appeal by the same attorney that represented him at trial. *United States vs. Selva*, 559 F.2d 1303, 1305-06 (5th Cir. 1977). In *Selva*, the court held that where the defendant is represented by the same attorney at trial and ap-

peal, reversal is called for only if the defendant can "show that failure to record and preserve the specific portion of the trial proceedings visits a hardship upon him and prejudices his appeal." *Id.* at 1305; *see e.g., United States vs. Smith,* 591 F.2d 1105, 1108 (5th Cir. 1979); *United States vs. Alfonso,* 552 F.2d 605, 620 (5th Cir. 1977). Where, however, as here, the defendant is represented by new counsel on appeal, all that need be shown is a substantial and significant omission in the transcript. *United States vs. Selva,* 559 F.2d 1303, 1305 (5th Cir. 1977); *United States vs. Gregory,* 472 F.2d 484, 486 (5th Cir. 1973). The *Selva* analysis has been followed in *United States vs. Brumley,* 560 F.2d 1268, (5th Cir. 1977) (unreported bench conferences) and *United States vs. Taylor,* 607 F.2d 153, 154-55 (5th Cir. 1979) (unreported charge to the jury). But see *United States vs. Stefan,* 784 F.2d 1093 (11th Cir. 1986) (unreported bench conferences deemed not to be "substantial and significant omission . . .")

In the present case, petitioners are represented by new counsel on appeal. Thus, under the *Selva* analysis, all they need show is "a substantial and significant omission in the transcript." Therein lies the problem.

The government has claimed all the omissions from the Record are neither substantial nor significant and has attempted to reconstruct the Record based on its selective memory of the events at issue.

Petitioners' newly retained appellate counsel have claimed all the omissions from the Record are substantial and significant and that no reconstruction of the Record is

possible due to the passage of time and government bias.[3] Counsel are in no position to reconstruct the Record since they were not at the trial.

The trial judge, already in senior status at the time of the trial and about eight years older by the time of the remand hearing, agrees with the government's factual reconstruction on some matters but not on others.[4] *See* Appendix B at B-23, 31, 35, 48. He concluded, "reluctantly," that there was one significant and substantial omission that required a new trial on two counts, but that the rest of the omissions were neither significant nor substantial. *See* Appendix B at B-50.

Petitioners persist in their claim that all the omissions were significant and substantial and that the Record cannot be reconstructed.

For example, petitioners assert that the missing testimony of co-defendant Herbert Williams, which the judge on remand agreed was significant and substantial as

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[3] The trial prosecutors in this case, Donald E. Christopher and Steven D. Milbrath, were so angry when Judge Hoffman granted the Rule 29 motion originally acquitting petitioners—albeit briefly—that they knowingly violated the Justice Department's Petite Policy by indicting petitioner Murgo and arresting him at gunpoint on basically the same charges for which he was acquitted. The Justice Department forced dismissal of the indictment. However, these same prosecutors were brought back from private practice as special Assistant U.S. Attorneys for this hearing.

[4] Remarkably, the judge implies his memory of the testimony and exhibits was clearer after the hearing when he wrote his Report than during the hearing. *See* Appendix B at B-22 .

to two counts against petitioner Murgo, is significant and substantial as to all counts regarding both petitioners.

Ever since before the trial of this case, petitioners have asserted that the trial judge erred in not severing the defendants from each other. Petitioners have also since trial argued insufficiency of evidence and that the government alleged only one conspiracy but if any criminal conduct was proved at all, proved two conspiracies. In fact it was on these points that the trial judge originally granted petitioners' Rule 29 motion.

The testimony of Williams, a co-defendant at trial who was acquitted, was crucial to the severance, one conspiracy versus two, and sufficiency of the evidence issues.

Furthermore, it is clear that the responses to jury questions by Judge Young, substituting for Judge Hoffman, is missing. One of the jury inquiries referred to a problem the jury was having in reaching verdicts on some unidentified counts. Counsel could not agree on what Judge Young responded. Judge Hoffman who was not even there, held Judge Young's response, whatever it was, could not be reversible error since counsel did not object. *See* Appendix B at B-40, 41-43.

However, this Court in *Hardy*, emphasized that an attorney on appeal had a duty to search out plain error as well as error objected to by defense counsel. Accordingly, Judge Young's missing response to the jury's question was clearly a substantial and significant omission. Certainly it cannot be affirmatively said that there was no *possibility* of error other than harmless error, which is the correct standard under *Upshaw, supra*, 448 F.2d at 1224.

Petitioners also have objections to the conduct of the remand hearing and specific findings of fact and conclusions of law by the hearing judge.

For example, Fed.R.App.P. 10(c) states:

> (c) **Statement on the Evidence or Proceedings When No Report Was Made or when the Transcript is Unavailable.** If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the *appellant* may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal. (Emphasis added)

The Rule clearly allows the appellant, not the appellee, to prepare a statement of the evidence when a transcript is unavailable. However, here, due to the passage of time and the fact that appellants had newly retained counsel, the appellants were not able to reconstruct the Record. Contrary to Rule 10(c) the district judge allowed the *appellee* to prepare statements of evidence (*See* Appendix B at B-23, 24, 35, 43, 48) even though the appellees were demonstrably biased.

When counsel for Mr. Murgo attempted at the hearing to prove the prosecutors' particularized bias

against Mr. Murgo, the judge angrily forced counsel to drop his line of questioning. However, the line of questioning went directly to the credibility of the government's attempted reconstruction of the evidence and should have been allowed.

Petitioner had no opportunity to contest at the hearing findings made by the judge based on recollections the judge allegedly had after the hearing. Petitioners' counsel should have been allowed access to any notes used by the trial judge after the hearing. Counsel should also have been allowed to contest the reliability of the judge's memory.

In his Motion for Reconsideration counsel for petitioner Murgo specifically argued that there were material misstatements in the district court's Report on Limited Remand. Fed.R.App.P. 10(e) authorizes the Court of Appeals upon "proper suggestion" to direct that the misstatements be corrected. By not now correcting the misstatements the Court of Appeals has abused its discretion and violated petitioners' Sixth and Fifth Amendment rights.

These are not issues counsel can simply raise in the general appeal. How the Court of Appeals finds with regard to the contested findings of fact and conclusions of law affect not only the missing transcript issue but virtually every issue to be raised on appeal including, but not limited to, severance, variance, and sufficiency of the evidence. Even the presentation of the issues is affected.

Even if the Court of Appeals upheld the remand judge on most of his findings, it would still affect the presentation by petitioners of their issues on appeal.

It must also be remembered that the Report on Remand was 40 pages long. Petitioners' appellate brief can only be 55 pages long. If counsel had to use his appellate brief for objections, he would have no room to brief the rest of the legal issues.

In this case, the Court of Appeals acted basically as a district court remanding the case back to Judge Hoffman who was told to act as a magistrate and make findings. Had this happened in district court, petitioner would have been allowed to file objections so that the matter could be straightened out prior to appellate briefing.

Why not now?

CONCLUSION

For the reasons set forth above, this petition should be granted and the Writs of Mandamus and Prohibition issued.

Respectfully submitted,

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APPENDIX A

Orders and Memoranda of the Court of Appeals for the Eleventh Circuit in *United States vs. Murgo, La Spesa, et al.*, Docket No. 85-3131

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 85-3131

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES J. CALLY,
JOSEPH LA SPESA,
VICTOR E. MURGO,
STEVEN A. SARAULT,
AIME J. SARAULT,

Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

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Before FAY, ANDERSON and EDMONDSON, Circuit Judges.

BY THE COURT:

Appellant, Murgo's motion to stay further proceedings, pending completion of the record is GRANTED.

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* Filed October 6, 1986.

This case is REMANDED in accordance with FRAP 10 (e), to the United States District Court for the Middle District of Florida, for correction of the record. Counsel for the government and counsel for all defendants shall cooperate to the end that the record can be completed as expeditiously as possible.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 85-3131

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

JAMES J. CALLY,
JOSEPH LA SPESA,
VICTOR E. MURGO,
STEVEN A. SARAULT,
AIME J. SARAULT,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

Before FAY, ANDERSON and EDMONDSON, Circuit Judges.

BY THE COURT:

Defendants Victor Murgo and Joseph LaSpesa have moved this court for summary reversal of their convictions. Murgo was represented at trial by Gerald Jones, Jr. and is

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* Filed January 9, 1989.

represented on appeal by Jake Arbes. LaSpesa was represented during part of his trial by Allen Merton, who also represents him on appeal. Defendants Steven Sarault and Aime Sarault, both represented on appeal by their trial counsel, have not filed or joined in the motions for summary reversal filed by Murgo and LaSpesa. Defendant Cally, who appeared pro se at trial and continues pro se on appeal, has filed his opening brief on August 21, 1986. He has not filed or joined in the motion for summary reversal filed by defendants Murgo and Cally.

On October 6, 1986, this panel remanded this cause to the district court in accordance with Fed.R.App.P. 10(e). That order directed that government counsel and counsel for all defendants cooperate with the district court to complete the record so as to enable this appeal to proceed. This court's order of remand contemplated and authorized necessary judicial proceedings to resolve whether segments of the record were missing and to correct these or determine that correction was not possible. No judicial proceedings have yet occurred in the district court pursuant to this remand. Rather, contacts have been made between district court clerk's office personnel, court reporters, and appellate counsel, primarily Mr. Arbes and to a lesser degree Mr. Merton.

Our review of the record satisfies us that there are some portions of the trial proceedings which are not included in the record. Accordingly, we remand this case to the district court with instructions. The district court shall make findings identifying the portions of the record which are missing. The district court shall also conduct appropriate proceedings with a view to reconstructing any missing

portions of the record pursuant to Fed.R.App.P. 10(c) and 10(e). *See United States v. Selva*, 546 F.2d 1173 (5th Cir. 1977).

If the district court concludes that reconstruction of the record is not possible, it shall make findings with respect thereto. Specifically, with respect to Victor Murgo, who is represented on appeal by new counsel, the district court shall make findings with respect to whether the missing portions are "substantial and significant" such that it cannot be concluded "affirmatively that no substantial rights of the appellant have been adversely affected," *United States v. Selva*, 559 F.2d 1303, 1306 (5th Cir. 1977). With respect to Joseph LaSpesa, whose appellate counsel represented him during part of his trial, the district court first shall determine which of the two tests set forth in *Selva* is applicable — i.e., the lesser standard for defendants whose appellate counsel was not their trial counsel or the more stringent standard for defendants who are represented on appeal by their trial counsel. If the district court determines that the less stringent *Selva* test applies, the court shall proceed as instructed above with respect to Murgo; and if the court determines that the more stringent *Selva* test applies, the court shall make findings with respect to whether LaSpesa has demonstrated specific prejudice caused by the missing portions of the transcript. With respect to both Murgo and LaSpesa, if its findings so indicate, the district court shall have authority to certify its intention to grant a new trial.[1]

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[1] Since this is a limited remand, the procedure would be for the district court to certify to this court its determination that a new trial should be granted, whereupon this court could entertain a motion to remand for that purpose. *United States v. Ellsworth*, 814 F.2d 613 (11th Cir. 1987).

Because this case was tried by a visiting judge sitting by designation, i.e., Senior U.S. District Judge Walter E. Hoffman, this case is remanded to the Chief Judge of the Middle District of Florida, William Terrell Hodges, for appropriate assignment, either to Judge Hoffman or otherwise.

Attached to this order is Appendix A summarizing our review of the present record and indicating portions of the record that seem to be missing. Also attached to this order is Appendix B which lists each transcript which has been filed and indicates in bold type certain proceedings which seem not to have been filed. The appendices are offered merely as assistance to the district court on remand. We expressly make no findings which are binding on the district court in this regard.

Accordingly, the motions for summary reversal filed by defendants Murgo and LaSpesa are DENIED, and the case is REMANDED to the district court for further proceedings consistent herewith.

APPENDIX A

In his motion, Murgo contends in paragraph 16 that eleven transcript segments are missing from the record. He also contends that numerous exhibits are missing from the record, and incorporates into paragraph 14 of his motion a January 27, 1987 letter from district court deputy clerk Sandy Zimmerman. That letter attaches exhibit lists which purport to identify exhibits included in the record with either check marks or "x" marks; those not so marked are alleged to be missing. In paragraph XIII of his motion, La Spesa adopts Murgo's contentions about missing transcript

segments, and asserts in paragraph XX that numerous exhibits are missing, specifying that only five of the exhibits offered by LaSpesa are in the record.

A review of the record as it is presently constituted reveals that the following portions of the transcribed proceedings are probably missing:

1. A transcript excerpt from January 12, 1983 consisting of direct examination and cross-examination of witness Joseph Beaulieu (referred to in ROA Vol. 24, p. 2) is not in the record. This testimony occupied about one hour, apparently beginning approximately 2:00 p.m. following testimony of John Brennan (in ROA Vol. 25) and ending at a recess announced as planned for 3:00 p.m. that day (*See* Vol. 25, pp. 107-08). Libby Lester Reporting Service was apparently in attendance and is responsible for this transcript excerpt.

2. A transcript excerpt of direct and cross-examination testimony of Alex Feinman on January 17, 1983 (referred to in ROA Vol. 29, p. 82) is not in the record. Libby Lester Reporting Service was apparently in attendance and is responsible for this transcript excerpt.

3. On January 31, 1983, three witnesses apparently testified. An excerpt of testimony by D. Gill and S. Owens has been filed. James Roberts apparently testified for the remainder of the day. A transcript of his testimony (referred to in ROA Vol. 43, p. 33) has not been filed. Libby Lester Reporting Service was apparently in attendance and is responsible for this transcript.

4. No transcript of trial proceedings on February 1, 1983 has been filed. Only James R. Roberts apparently testified (his testimony began on January 31 *supra*). Libby Lester Reporting Service was apparently in attendance and is responsible for this transcript.

5. No transcript of trial proceedings on February 9, 1983 has been filed. Two witnesses apparently testified: Frances Rottmeyer continued direct and cross-examination; Paul Kfoury began his direct testimony, which continued on February 10. Libby Lester Reporting Service was apparently in attendance and is responsible for this transcript.

6. Three transcripts of testimony on February 15, 1983, have been filed. (ROA Vol. 63 consists of continued direct examination and cross-examination of Michael Kay and of the direct and cross-examination of Rex Baker. ROA Vol. 64 duplicates pp. 41 through 48 of Vol. 63 and ROA Vol. 65 duplicates pp. 104 through 111 of Vol. 63). Transcripts of the remainder of Michael Kay's direct testimony as well as testimony apparently offered by another witness named Richard H. Donais, have not been filed. Libby Lester Reporting Service was apparently in attendance and is responsible for this transcript.

7. On February 18, three witnesses apparently testified. Transcripts of the continued direct testimony and cross-examination of witnesses Christopher Uzzi and of the direct and cross-examination of Michael Strauss have been filed (ROA Vols. 73, 74). No transcript has been filed of the testimony apparently given by Elaine Bradley. Libby Lester Reporting Service was apparently in attendance and is responsible for this transcript.

8. On February 25, four witnesses apparently testified. A transcript has been filed containing testimony of T. Temple, J. Richardson and D. Gill in which page 126 is missing (1st Supp. ROA Vol. 3, p. 131). An excerpt of testimony by J. Beaulieu (referred to in 1st Supp. Vol. 3, p. 131) has not been filed. Court Reporter Karen (Van Nuis) Calvacca was apparently in attendance and is responsible for this transcript.

9. On December 9, 1983, a transcript of proceedings on February 26 was filed in the district court and noted on its docket. This transcript has not been included with the record. It may be the Beaulieu excerpt referred to in the preceding paragraph, but its actual content is unknown.

10. On March 7 three witnesses apparently testified. A transcript of testimony by J. Araman and R. Albey has been filed. An excerpt of testimony by J. Beaulieu (referred to in ROA Vol. 89, p. 32) has not been filed. Court Reporter Vicki Blumenauer was apparently in attendance and is responsible for this transcript.

11. On March 14 it appears that at least two witnesses may have testified. A transcript of testimony given by defendant S. Sarault commencing about 3:00 p.m. in the afternoon of March 14, and continuing throughout the day on March 15, as well as on the morning of March 16, has been filed (1st Supp. ROA Vol. 5). No transcript has been filed of proceedings on the morning and early afternoon of March 14, during which some testimony was apparently offered (possible referred to in 1st Supp. ROA Vol. 5, p. 5) on behalf of defendant Herbert Williams

(apparently by Williams himself). Court reporter Karen (Van Nuis) Calvacca was apparently in attendance and is responsible for this transcript.

12. On March 16 only a transcript of the conclusion of cross-examination of defendant S. Sarault has been filed (pp. 286-302 of 1st Supp. ROA Vol. 5). Only one exhibit, Govt. No. 697, was numbered for identification on March 16. However, this exhibit was neither offered nor admitted that day. It is unclear whether any further testimony was taken on Wednesday, March 16. It is likely that court reporter Karen (Van Nuis) Calvacca was in attendance.

13. No transcript has been filed for proceedings on March 17 or 18. The district court docket sheet does not indicate trial proceedings on either of those days. However, on March 17, the government's requested jury instructions were filed in the clerk's office and on March 18 defendant LaSpesa's exhibit list notes testimony by a Dr. Davies. It is unknown which court reporters were in attendance on either of these days or whether there was testimony by other witnesses.

14. An excerpt of the court's charge to the jury on March 25 is in the record (ROA Vol. 99). However, no transcript of the remainder of proceedings that day is in the record. Court reporter Jean Carolan was apparently in attendance and is responsible for this transcript.

15. There is no transcript of proceedings on March 30, 1983. By that time jury deliberations had almost concluded. Based upon the Court Exhibits, which are in the record, it appears that there was communication between the trial judge and jurors

and that verdict was rendered that day. It is unknown which reporter attended these proceedings.

Appellants Murgo and LaSpesa also suggest that numerous exhibits may be missing from the record. We note that the record, in Volume 1, contains only exhibit lists for the government and for defendant Murgo. A copy of the exhibit lists for defendants Steven Sarault and Joseph LaSpesa were attached to the January 20, 1987 letter of district court deputy clerk Zimmerman. Volume 1 of the record should probably be supplemented with either the original or copies of those exhibit lists. We further note that there has been no list filed of Court Exhibits which are included in the record. There are fourteen such exhibits, with two separate notes from the jury both identified as No. 13. Volume 1 of the record probably should also be supplemented with either the original or a copy of the Court Exhibit list, or such substitute therefor as may be directed by the district court upon remand.

Our review indicates that only the following numbered government exhibits are in fact missing from the record: 522aaa, 550, 551 and 701. All of defendant Murgo's exhibits are contained in the record with the exception of Nos. 103, 103a, 103b, 103e, 103f, 103h and 103i. Except for Exhibit No. 103, all of these are noted on the exhibit list as "withdrawn." Defendant Steven Sarault's Exhibit No. 7 is missing from the record. Defendant La Spesa's Exhibit list shows Exhibit Nos. 1 through 26, plus 26a, 26b and 26c. Of these, only Exhibits 5, 8, 11, 24 and 25 are in the record.

APPENDIX B

Date of Proceeding	Date Trans. Filed in Dist. Court	Nature of Proceeding & Testifying Witnesses	Court Reporter	ROA No. Vol.	No. Pgs.
07-02-82	07-16-82	Bail Hearing — LaSpesa	Lester	15	33
07-12-82	07-19-82	Arraignment	Lester	16	57
08-03-82	08-04-82	Motion to travel — Murgo	Lester	17	49
08-06-82	12-13-82	Bail Hearing — Murgo	Schmitt	2nd Supp.	
12-12-82	04-23-84	Motions Hearing	Lester	18	202
01-10-83	07-31-85	Voir Dire	Lester	19	148
01-10-83	07-31-85	Voir Dire	Lester	20	220
01-11-83	01-26-83	Opening Statement — USA	Lester	21	120
01-11-83	07-31-85	Opening Statements — Defendants	Lester	22	111
01-11-83	01-26-83	Trial — J. Richardson, D. Gill	Lester	23	54
01-12-83	07-31-85	Trial — S. Borgos; excerpts noted for J. Richardson (further	Lester	24	37

Date of Proceeding	Date Trans. Filed in Dist. Court	Nature of Proceeding & Testifying Witnesses	Court Reporter	ROA No. Vol.	No. Pgs.
		direct, cross), J. Brennan (direct, cross), J. Beaulieu (direct, cross)			
01-12-83	01-26-83	Trial — J. Richardson, J. Brennan	Lester	25	121
01-12-83	**xxxxxx**	**Trial — excerpt for J. Beaulieu**	**Lester**	**xx**	**xxx**
01-13-83	07-31-85	Trial — S. Borgos	Lester	26	185
01-14-83	08-22-85	Trial — S. Borgos, D. Tartino, A. DaMory	Lester	27	121
01-14-83	08-22-85	Trial — A. DaMory, T. Parker, C. Shumaker	Lester	28	232
01-17-83	08-22-85	Trial — C. Shumaker, excerpts noted for A. Fineman, E. Ades	Lester	29	169
01-17-83	**xxxxxx**	**Trial — excerpt for Alex Feinman**	**Lester**	**xx**	**xxx**

Date of Proceeding	Date Trans. Filed in Dist. Court	Nature of Proceeding & Testifying Witnesses	Court Reporter	ROA No. Vol.	No. Pgs.
01-18-83	07-31-85	Trial — E. Ades, J. Richardson, R. Anderson	Lester	30	172
01-19-83	07-31-85	Trial — R. Anderson, J. Richardson, R. Ayers	Lester	31	178
01-20-83	07-31-85	Trial — R. Ayers	Lester	32	111
01-20-83	07-31-85	Trial — R. Ayers, D. Gill, W. Landers, R. Jordan	Lester	33	265
01-21-83	07-31-85	Proceedings (sick juror)	Lester	34	53
01-24-83	08-22-85	Trial — L. Weatherspoon, R. Wilkerson, J. Ylincheta	Lester	35	97
01-24-83	08-22-85	Trial — J. Ylincheta, B. Armstrong	Lester	36	221
01-25-83	08-22-85	Trial — W. Mouttet	Lester	37	102
01-25-83	08-22-85	Trial — W. Mouttet, J. Richardson, excerpts noted for R. Harbour	Lester	38	173
01-25-83	08-26-83	Trial — R. Harbour	Lester	39	47

Date of Proceeding	Date Trans. Filed in Dist. Court	Nature of Proceeding & Testifying Witnesses	Court Reporter	ROA No. Vol.	No. Pgs.
01-26-83	07-31-85	Trial — R. Harbour, J. LaSpesa	Lester	40	40
01-27-83	08-19-83	Trial — R. Harbour	Lester	41	183
01-26-83& 01-27-83	07-31-85	Trial — R. Harbour, J. Richardson, M. Koth	Lester	42	160
01-31-83	07-31-85	Trial — D. Gill, S. Owens	Lester	43	34
01-31-83	**xxxxxx**	**Trial — excerpt for James R. Roberts**	**Lester**	**xx**	**xx**
02-01-83	**xxxxxx**	**Trial — James R. Roberts**	**Lester**	**xx**	**xx**
02-02-83	07-31-85	Trial — W. Landers, S. Moorhead	Lester	44	136
02-03-83	03-17-83	Trial — G. Manack	Lester	45	42
02-03-83	07-31-85	Trial — S. Moorhead, J. Richardson, R. Jerles	Lester	46	117
02-03-83	07-31-85	Trial — R. Jerles, R. Wilkerson, G. Manack	Lester	47	227
02-04-83	03-17-83	Trial — G. Manack	Lester	48	115
02-04-83	08-22-85	Trial — G. Manack, R. Jordan	Lester	49	126

Date of Proceeding	Date Trans. Filed in Dist. Court	Nature of Proceeding & Testifying Witnesses	Court Reporter	ROA No. Vol.	No. Pgs.
02-04-83	03-25-83	Trial — G. Manack	Lester	50	21
02-07-83	08-22-85	Trial — R. Jordan, J. Richardson, J. Whalen, R. Wilkerson, J. Webber	Lester	51	103
02-07-83	08-22-85	Trial — J. Webber, J. Hagen	Lester	52	213
02-08-83	07-31-85	Trial — J. Hagen, J. Richardson	Lester	53	111
02-08-83	07-31-85	Trial — A. Brown, M. Puse, F. Rottmeyer	Lester	54	236
02-09-83	**xxxxxx**	**Trial — F. Rottmeyer (cont. direct, cross), P. Kfoury**	**Lester**	**xx**	**xxx**
02-10-83	08-22-85	Trial — P. Kfoury, C. King, D. Gill, J. Floyd	Lester	55	92
02-10-83	08-22-85	Trial — J. Floyd	Lester	56	194
02-11-83	02-24-83	Trial — B. Diem	Lester	57	31
02-11-83	08-22-85	Trial — B. Diem	Lester	58	99
02-11-83	08-22-85	Trial — B. Diem, B. Chapman,	Lester	59	228

Date of Proceeding	Date Trans. Filed in Dist. Court	Nature of Proceeding & Testifying Witnesses	Court Reporter	ROA No. Vol.	No. Pgs.
		R. Bittner, F. Hallauer			
02-14-83	09-14-83	Trial — M. Kay	Lester	60	69
02-14-83	07-31-85	Trial — C. Hallauer, C. Herberich, M. Diner	Lester	61	118
02-14-83	07-31-85	Trial — M. Diner	Lester	62	167
02-15-83	09-08-83	Trial — N. Kay (cont. direct), R. Baker (direct)	Lester	63	166
02-15-83	03-17-83	Trial — R. Baker (excerpt)	Lester	64	11
02-15-83	02-24-83	Trial — M. Kay (excerpt)	Lester	65	11
02-15-83	**xxxxxx**	**Trial — Michael Kay (direct); Richard H. Donais**	**Lester**	**xx**	**xx**
02-16-83	09-14-83	Trial — R. Baker	Lester	66	105
02-16-83	09-14-83	Trial — R. Baker	Lester	67	161
02-16-83	09-14-83	Trial — R. Baker	Lester	1st Supp.1	105
02-16-83	09-14-83	Trial — R. Baker	Lester	1st Supp.2	161
02-17-83	07-31-85	Proceedings	Lester	68	12
02-17-83	02-24-83	Trial — C. Uzzi, J. Attonito	Lester	69	38

Date of Proceeding	Date Trans. Filed in Dist. Court	Nature of Proceeding & Testifying Witnesses	Court Reporter	ROA No. Vol.	No. Pgs.
02-17-83	02-21-83	Proceedings	Lester	70	12
02-17-83	09-30-83	Trial — R. Baker, C. Uzzi	Lester	71	138
02-17-83	10-05-83	Trial — C. Uzzi	Lester	72	272
02-18-83	08-26-83	Trial — C. Uzzi	Lester	73	114
02-18-83	07-08-83	Trial — M. Strauss	Lester	74	100
02-18-83	02-24-83	Proceedings	Lester	75	9
02-18-83	02-24-83	Proceedings	Lester	76	13
02-18-83	**xxxxxx**	**Trial — Elaine Bradley**	**Lester**	**xx**	**xx**
02-19-83	07-31-85	Trial — F. Rottmeyer, P. Kfoury	Lester	77	160
02-21-83	07-31-85	Trial — B. Hoffman, M. Cooper, D. Curro, R. Walker	Carolan	78	81
02-21-83	02-25-83	Trial — M. Beer	Qualified	79	37
02-21-83	03-07-83	Trial — R. Lewis	Qualified	80	97
02-21-83	03-01-83	Trial	Qualified	81	10
02-22-83	03-01-83	Trial — R. Walker	Qualified	82	59
02-22-83	03-16-83	Trial — R. Maciejczak	Qualified	83	42
02-22-83	08-20-85	Trial — excerpts noted for	Blumenauer	84	120

Date of Proceeding	Date Trans. Filed in Dist. Court	Nature of Proceeding & Testifying Witnesses	Court Reporter	ROA No. Vol.	No. Pgs.
		R. Walker, L. Petrich, D. Gill, J. Richardson			
02-23-83	08-20-85	Trial — T. Temple	Blumenauer	85	68
02-23-85	03-12-85	Bail hearing — excerpt	Van Nuis	86	10
02-24-83	08-20-85	Trial — T. Temple	Blumenauer	87	50
02-25-83	01-21-86	Trial — T. Temple, J. Richardson, D. Gill	Qualified	1st Supp.3	132
02-25-83	**xxxxxx**	**Trial — J. Beaulieu (excerpt)**	**Van Nuis**	**xx**	**xxx**
02-26-83	11-15-85	Trial — J. Bartell	Calvacca	88	111
02-26-83	**12-09-83**	**Trial — filed in D.Ct. (contents unknown — possibly Beaulieu excerpt)**	**Van Nuis**	**xx**	**xxx**
03-07-83	08-20-85	Trial — J. Araman, R. Alberg, excerpts noted for J. Beaulieu	Blumenauer	89	55
03-07-83	**xxxxxx**	**Trial — J. Beaulieu (excerpt)**	**Blumenauer**	**xxx**	**xxx**
03-08-83	408-24-87	Trial	Van Nuis	3rd Supp.1	

Date of Proceeding	Date Trans. Filed in Dist. Court	Nature of Proceeding & Testifying Witnesses	Court Reporter	ROA No. Vol.	No. Pgs.
03-08-83	12-09-83	Trial — J. Beaulieu	Van Nuis	1st Supp.4	112
03-08-83	11-15-85	Trial — A. Sarault	Calvacca	90	303
03-09-83	08-20-85	Trial — Seltzer, D. Barry, J. Collins, J. Shockey, L. Brown	Blumenauer	91	153
03-10-83	08-20-85	Trial — N. Pace, D. Gill	Blumenauer	92	169
03-11-83	08-20-85	Proceedings	Blumenauer	93	144
03-14-83	**xxxxxx**	**Trial — (witnesses for H. Williams)**	**Van Nuis**	**xx**	**xxx**
03-14-83	11-16-83	Trial — S. Sarault	Van Nuis	1st Supp.5	1-89
03-15-83	11-16-83	Trial — S. Sarault (beginning at pg. 90)	Van Nuis	1st Supp.5	90-285
03-16-83	11-16-83	Trial — S. Sarault (beginning at pg. 286)	Van Nuis	1st Supp.5	286-302
03-16-83	**xxxxxx**	**Trial — (unknown witnesses)**	**Van Nuis**	**xx**	**xx**
03-17-83	**xxxxxx**	**Trial — (unknown witnesses)**	**xxxxxx**	**xx**	**xx**

Date of Proceeding	Date Trans. Filed in Dist. Court	Nature of Proceeding & Testifying Witnesses	Court Reporter	ROA No. Vol.	No. Pgs.
03-18-83	**xxxxxx**	**Trial — (Dr. Davies and other possible witnesses)**	**xxxxxx**	**xx**	**xx**
03-21-83	07-31-85	Trial — H. Oppen, P. Moss	Carolan	94	90
03-22-83	04-13-83	Trial — M. Strauss	Qualified	95	30
03-23-83	08-20-85	USA closing, Murgo closing	Blumenauer	96	174
03-23-83	07-31-85	Trial — J. Bemis, N. Page, W. Henterly, D. Quinn, J. Richardson, H. Williams	Carolan	97	148
03-24-83	08-20-85	Defendant's closing	Blumenauer	98	200
03-25-83	11-21-83	Jury instructions excerpts	Carolan	99	10
03-25-83	**xxxxxx**	**Jury Instructions — remaining portions)**	**Carolan**	**xx**	**xx**
03-25-83	07-31-85	Defendant's closing, rebuttal proceedings prior to instructions	Carolan	100	95
03-30-83	**xxxxxx**	**Trial — (communications with jury, verdict)**	**xxxxxx**	**xxx**	**xx**

Date of Proceeding	Date Trans. Filed in Dist. Court	Nature of Proceeding & Testifying Witnesses	Court Reporter	ROA No. Vol.	No. Pgs.
02-04-84	03-29-84	Motion re: Travel (Murgo)	Van Nuis	101	36
01-29-85	02-12-85	Motion re: Travel (Murgo)	Carolan	102	23
03-04-85	05-08-85	Motion re: Travel (Murgo)	Stieber's	103	27
03-11-85	06-03-85	Motion re: Travel (Murgo)	Stieber's	104	25
05-09-85	11-18-85	Motions Hearings	Qualified	105	111
05-10-85	11-18-85	Motion to set aside verdict — order	Qualified	106	10
05-29-85	06-03-85	Motion re: Travel (Murgo)	Stieber's	107	20
10-22-85	11-07-85	Motion re: Travel (Murgo)	Still	108	30

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Miguel J. Cortez
Clerk

In Replying Give Number
Of Case And Names of Parties

August 25, 1989

MEMORANDUM TO COUNSEL OR PARTIES:

RE: 85-3131 USA v. Cally
DC DKT NO.: 82-00067 CR-ORL-Y

Pursuant to Fed.R.App.P. 12(b), be advised that the record is complete for purposes of appeal. APPELLANT'S BRIEF AND RECORD EXCERPTS ARE DUE WITHIN 40 DAYS FROM THIS DATE in accordance with Fed.R.App.P. 31. In cross-appeals, the plaintiff in the court below is deemed the appellant unless the parties otherwise agree. See Fed.R.App.P. 28, 30, 31 and 32, and the corresponding circuit rules for further information on preparing briefs and record excerpts.

If the original record on appeal is needed to prepare your brief, it will be made available to you upon written request.

Please note that it is court policy in multi-party cases that lack of timely access to the record is not an adequate basis for extending the time for filing briefs. Further, the court

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* Filed August 25, 1989.

expects that briefs will be timely filed without extensions of time unless extraordinary circumstances are shown.

Sincerely,

/s/ Miguel J. Cortez

MIGUEL J. CORTEZ, Clerk

Reply To: Denza Bankhead (404) 331-3843

Note: The brief of James J. Cally is on file.

BR-1 (1/89)

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Miguel J. Cortez
Clerk

In Replying Give Number
Of Case And Names of Parties

September 5, 1989

MEMORANDUM TO ADDRESSEES:

RE: 85-3131 USA v. Cally
DC DKT NO.: 82-00067 CR-ORL-Y

The following action has been taken in the referenced case:

* The briefing schedule of 8/25/89 is rescinded. Counsel will be advised at a later date of any further requirements from the court.

Sincerely,

/s/ Miguel J. Cortez

MIGUEL J. CORTEZ, Clerk

Reply To: Denza Bankhead (404) 331-3843

MOT-2 (7/87)

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 85-3131

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES J. CALLY,
JOSEPH LA SPESA,
VICTOR E. MURGO,
STEVEN A. SARAULT,
AIME J. SARAULT,

Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

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(February 15, 1990)

Before FAY, ANDERSON and EDMONDSON, Circuit Judges.

BY THE COURT:

This court has received the report of the district court made pursuant to this Court's order of limited remand dated January 9, 1989. After consideration of this order, it appears that the record on appeal is now substantially

complete and that the district court has considered the effect of those segments of the record which remain missing. It further appears that without the benefit of full briefing on the merits of this appeal, this Court cannot make a proper determination of the effect of those few segments of the record which remain missing or of the adequacy of those summaries of the evidence prepared and filed at the direction of the district court pursuant to Fed.R.App.P.10(c). It is therefore ORDERED that:

Appellants' briefs shall be filed sixty (60) days from the date of this order.

Appellee's brief shall be filed sixty (60) days after service of the last appellant's brief.

Reply briefs shall be filed fifteen (15) days after service of the brief of appellee.

Each appellant is directed to include in his opening brief a discussion of the adequacy of the record as it pertains to him. The parties should also address whether or not their failure to respond in writing to the district court's request that any objections to the government's summaries of testimony be filed within ten (10) days after the limited remand hearing constituted a waiver of the right to object to facts in those summaries of testimony by those appellants who did not respond.

Any motions for summary reversal which may be filed will be carried with the case and will not toll the briefing schedule.

The court recognizes that James J. Cally has already filed an opening brief. Appellant Cally may file a

supplemental brief if he so desires within sixty (60) days from the date of this order.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 85-3131

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES J. CALLY,
JOSEPH LA SPESA,
VICTOR E. MURGO,
STEVEN A. SARAULT and
AIME J. SARAULT,

Defendants-Appellants.

On Appeal from the United States District Court for the Middle District of Florida

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ORDER:

Upon consideration of appellant La Spesa's motion for extension of time for filing and serving brief and appellant Murgo's motion "for reconsideration of February 15th order of court or alternatively motion for stay or alternatively motion for extension of time within which to file appellant's file", appellants La Spesa, Murgo, Steven A. Sarault and

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* Filed March 21, 1990.

Aime J. Sarault are GRANTED to and including September 14, 1990 to file their briefs.

Appellant La Spesa's retained counsel's, Allen Melton, substitution of retained counsel, requesting substitution with Joseph E. Ashmore and C. Gregory Shamoun as counsel for La Spesa in the place of Melton is GRANTED.

/s/ R. LANIER ANDERSON
UNITED STATES CIRCUIT JUDGE

APPENDIX B

Opinions and Orders of the District Court in *United States vs. Murgo, La Spesa, et al.*, Docket No. 82-67 CR-Orl

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,

CASE No. 82-67 CR-Orl

versus

JAMES J. CALLY
JOSEPH LA SPESA
VICTOR E. MURGO
STEVEN A. SARAULT
AIME J. SARAULT,

No. 85-3131 in United States Court of Appeals for the Eleventh Circuit

ORDER

This cause is before me as Chief Judge on remand from the United States Court of Appeals for the Eleventh Circuit pursuant to the Order of that Court entered on January 9, 1989.

The case was tried in the Orlando Division in early 1983 by the Honorable Walter E. Hoffman, Senior United States District Judge sitting by designation. It appears from the docket record of this Court that the trial lasted in excess of two months. The Defendants (the present Appellants in the Court of Appeals) were found guilty of one or more offenses by the Jury; and, after being adjudged guilty and having sentence imposed by Judge Hoffman, instituted their appeals. It further appears from the docket records and from the Order of Remand to me as entered by the Court of Appeals on January 9, 1989, that the record on appeal has never been perfected and transmitted to the Court of

Appeals. That is, the Court of Appeals has determined that there are (or appear to be) missing and unaccounted for transcripts of portions of the testimony at trial as well as missing or unaccounted for exhibits presumably received in evidence at trial. Accordingly, the purpose of the present remand, pursuant to the Order of the Court of Appeals, is for this Court to ". . . make findings identifying the portions of the record which are missing [and to] conduct appropriate proceedings with a view to reconstructing any missing portions of the record pursuant to Fed. R. App. P. 10(c) and 10(e)." The Court of Appeals appropriately chose to remand the case to me as Chief Judge in view of the fact that Judge Hoffman tried the case as a visiting judge, but the Order expressly permits me to assign the matter ". . . either to Judge Hoffman or otherwise."

By coincidence, Senior Judge Hoffman has recently been designated by the Chief Justice to return to the Middle District of Florida as a visiting judge for the purpose of holding Court in the Orlando Division during a term commencing January 23, 1989 and ending February 24, 1989. As the Judge who presided over the trial of this case, Judge Hoffman would appear to be in a better position to conduct the proceedings on remand as directed by the Court of Appeals; and, therefore, considerations of judicial economy suggest that I should initially assign this matter to Senior Judge Hoffman for his consideration, especially in view of his anticipated availability within the District in the very near future.

Accordingly, with his consent, this case is hereby assigned to Senior United States District Judge Walter E. Hoffman for the purpose of conducting any and all proceed-

ings necessary to comply with the Order entered by the Court of Appeals on January 9, 1989. In the event Judge Hoffman should determine that it is judicially inconvenient for him to complete this assignment during his impending visit in the Middle District of Florida, he may, of course, re-assign the matter to me and I will thereupon undertake to comply with the Order of the Court of Appeals.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 17th day of January, 1989.

/s/ W. Terrell Hodges

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
Orlando Division

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus	)	NO. 82-67-CR-ORL-Y
	)	**********
JAMES J. CALLY,	)	
JOSEPH LA SPESA,	)	ON LIMITED REMAND
VICTOR E. MURGO,	)	FROM UNITED STATES
STEVEN A. SARAULT,	)	COURT OF APPEALS FOR
AIME J. SARAULT,	)	THE ELEVENTH CIRCUIT
	)	IN NO. 85-3131
	)	
Defendants-Appellants.	)	

ORDER

This cause having been remanded for a limited purpose from the United States Court of Appeals for the Eleventh Circuit to the Chief Judge of the United States District Court for the Middle District of Florida, with authority granted to said Chief Judge to make an appropriate assignment to a district judge, and

The Chief Judge of the United States District Court for the Middle District of Florida having entered an order assigning the matter to the undersigned who has been heretofore designated by the Chief Justice to hold court in the United States District Court for the Middle District of Florida, commencing January 23, 1989 to and including

Friday, February 24, 1989 and such further time as may be required to complete the business assigned to the undersigned, and

The purpose of this limited remand being to reconstruct, correct or modify the record, if the same is possible, said proceedings having omitted excerpts of the testimony of various witnesses, including certain entire days of trial testimony by witnesses, together with alleged missing exhibits. Appendix A, attached to the order of the United States Court of Appeals for the Eleventh Circuit filed January 9, 1989, attempts to summarize the omissions in the many transcripts of proceedings in the district court attended by contract reporters.

The Court being of the opinion that Rules 10(c) and 10(e) Fed. R. App. P., may be applicable to this limited remand, it is **ORDERED**:

(1) That a hearing be convened on Friday, February 24, 1989, at 9:30 a.m., in the United States Courthouse, 80 North Hughey Avenue, Orlando, Florida, for the purpose of attempting to reconstruct the record on appeal in this case and, if necessary, said hearing will be resumed on Saturday, February 25, 1989 at 9:30 a.m.

(2) That while the United States of America is designated as "plaintiff-appellant" and the individual defendants are designated as "defendant-appellee," in the caption of the order filed January 9, 1989, it is obvious that the defendants are the "appellants" herein. There are other minor errors in the order of January 9, 1989, same being:

(A) The order refers to Victor E. Murgo being represented at the trial by Gerald Jones, Jr. This is in-

correct. Murgo, during all stages of the trial proceedings was represented by Joseph A. Rosier. Jake Arbes started his representation of Victor E. Murgo during the post-trial, presentence stage of the proceedings. The undersigned does not believe that any order has been entered removing Mr. Rosier as counsel for Victor E. Murgo.

(B) Joseph La Spesa was represented at the start of his trial by Allen Melton of Dallas, Texas, who also had associate counsel in the person of Elmo R. Hoffman, an attorney practicing in Orlando, Florida. Mr. Melton almost daily renewed his efforts to be relieved of his duties as a trial attorney. After several days, with the express permission of Joseph La Spesa and with the understanding that the absence of Melton would never be asserted as error, the undersigned did permit Mr. Melton to absent himself from the balance of the trial. Mr. Melton reentered the case at some time after the verdict was returned. After La Spesa was sentenced the Court did then enter an agreed order permitting Elmo R. Hoffman to retire as counsel for La Spesa. As far as this Court is advised, Elmo R. Hoffman is still practicing law in this area.

(C) James J. Cally is an attorney in New York City and has, at all times, appeared *pro se*.

(3) On or before Friday, February 10, 1989, each individual appellant-defendant shall, by counsel or *pro se*, file with the Clerk of this Court a statement of the evidence of each witness deemed pertinent to the determination of guilt or innocence of defendant, and proceedings, if any, which have not heretofore been transcribed. Each attorney or *pro se* defendant may include his best recollection of the testimony and may use any other available means including any

statements by trial counsel, others with any recollection, and statements of court reporters. Persons declining to give statements may be summoned as witnesses to testify at the hearing on Friday, February 24, 1989, at 9:30 a.m.

The aforesaid statements shall be served on the United States Attorney in charge of this proceedings and, within ten (10) days after receipt of same, the United States Attorney will serve objections or proposed amendments to each statement of any witness who testified, the transcript of which is not available. The objections or proposed amendments shall include the recollection of the United States Attorney, his predecessors in office, and the investigating authorities as to what each witness may have testified, as well as the relevancy of this testimony in determining the guilt or innocence of each defendant as to each Count for which that defendant was found to be guilty.

(4) If there are transcripts available but not in complete form, and there are differences as to what the record truly discloses, counsel for the appellants and appellee shall submit a statement as to their recollection of what was actually said or done, as well as the materiality as to such differences, which said statements shall be filed with the Clerk on or before February 10, 1989. Such statements will be exchanged between all parties.

(5) If there are missing exhibits not now in the record, the party desiring the presence of such exhibit in the record shall specify (a) the number of the exhibit, (b) the approximate date that is was admitted into evidence or otherwise refused as an exhibit, (c) the materiality of said exhibit as it applied to a particular Count of the indictment under which the appellant-defendant was found guilty, and (d) whether

a copy of said missing exhibit is available and, if so, where it can be located. The parties shall exchange these documents, and file same with the Clerk, on or before February 17, 1989.

(6) The Clerk shall mail forthwith certified copies of this order to the *pro se* appellant, James J. Cally, and to all present and former counsel of record in these proceedings, according to their addresses last appearing of record, unless the Clerk is advised by counsel that a present or former counsel now maintains an address more current than that of record.

The Clerk need *not* send copies to present or former counsel of parties who are not named as appellants-defendants in the caption of this case.

The *pro se* defendant-appellant must be present at the hearing. As to the remaining appellants, they may attend, but are not required to be present if their attorneys are present.

/s/ Walter E. Hoffman
Senior United States District Judge
(Sitting by designation)

At Orlando, Florida
January 23, 1989.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
Orlando Division

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus	)	CASE NO. 82-67-CR-ORL-Y
	)	
JAMES J. CALLY,	)	
JOSEPH LA SPESA,	)	ON LIMITED REMAND
VICTOR E. MURGO,	)	FROM UNITED STATES
STEVEN A. SARAULT,	)	COURT OF APPEALS FOR
AIME J. SARAULT,	)	THE ELEVENTH CIRCUIT
	)	IN NO. 85-3131
	)	
Defendants-Appellants.	)	

ORDER

This cause having been remanded for the purpose of reconstructing, correcting, or modifying the record pursuant to Rule 10(c) and 10(e) Fed.R.App.P., it is hereby **ORDERED:**

(1) On or before Friday, February 17, 1989, each individual appellant defendant shall, by counsel or *pro se*, file with the Clerk of this Court copies of all correspondence, statements, receipts, and other records relating to the ordering, receiving, and payment of transcripts summarized in Appendix A to this Order.

(2) On or before Friday, February 17, 1989, each Court Reporter appearing on Appendix B to this

Order, shall file with the Clerk of this Court copies of all correspondence, statements, receipts, and other records relating to the ordering, transcribing, filing and payment of transcripts summarized in Appendix A to this Order.

(3) On or before Friday, March 10, 1989, each Court Reporter appearing on Appendix C, shall file with the Clerk of this Court all stenograph shorthand notes and any accompanying sound recordings relating to all proceedings in this cause.

DONE and **ORDERED** at Orlando, Florida, this 1st day of February, 1989

/s/ Walter E. Hoffman
Walter E. Hoffman
Senior United States District Judge
(Sitting by Designation)

Copies to:

All Counsel of Record
All Court Reporters of Record
James J. Cally, Pro-Se

APPENDIX A

Date of Proceeding	Date Trans. Filed in Dist. Court	Nature of Proceeding & Testifying Witnesses	Court Reporter	ROA No. Vol.	No. Pgs.
01-12-83	xxxxxx	Trial — excerpt for J. Beaulieu	Lester or Vicki Blumenauer	xx	xxx
01-17-83	xxxxxx	Trial — excerpt for Alex Feinman	Lester	xx	xxx
02-15-83	xxxxxx	Trial — Michael Kay (direct); Richard H. Donais	Lester	xx	xx
02-18-83	xxxxxx	Trial — Elaine Bradley	Lester	xx	xx
02-25-83	xxxxxx	Trial — J. Beaulieu (excerpt)	Van Nuis	xx	xxx
02-26-83	12-09-83	Trial — Filed in D. Ct. (contents unknown — possibly Beaulieu excerpt)	Van Nuis	xx	xxx
03-14-83	xxxxxx	Trial — (witnesses for H. Williams)	Van Nuis	xx	xxx
03-16-83	xxxxxx	Trial — (unknown witness)	Van Nuis	xx	xx
03-17-83	xxxxxx	Trial — (unknown witness)	xxxxxx	xx	xx
03-18-83	xxxxxx	Trial — (Dr. Davies and other possible witnesses)	xxxxxx	xx	xx
03-30-83	xxxxxx	Trial — (communications with jury, verdict)	xxxxxx	xxx	xx

APPENDIX B

Karen Calvacca, on behalf of herself and Qualified Reporters

Vicki Blumenauer

Libby Lester, on behalf of herself and Libby Lester Reporting Services, Inc.

APPENDIX C

Karen Calvacca, on behalf of herself and Qualified Reporters

Vicki Blumenauer

Libby Lester, on behalf of herself and Libby Lester Reporting Services, Inc.

Jean Carolan

Donald and/or Bernice Schmitt

Michael Stieber

Helen G. Still

Christine T. Riggs, on behalf of herself and Christine T. Riggs & Associates

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
Orlando Division

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus	)	CASE NO. 82-67-CR-ORL-Y
	)	
JAMES J. CALLY,	)	On Limited Remand
JOSEPH LA SPESA,	)	From United States
VICTOR E. MURGO,	)	Court of Appeals
STEPHEN A. SARAULT,	)	For the Eleventh
AIME J. SARAULT,	)	Circuit in
	)	No. 85-3131
	)	
Defendants-Appellants.	)	

REPORT ON LIMITED REMAND

To the Honorable Judges of the United States Court of Appeals for the Eleventh Circuit:

On January 9, 1989, the United States Court of Appeals for the Eleventh Circuit (Fay, Anderson and Edmondson, J.J.) entered an order, *iter alia,* remanding to the United States District Court for the Middle District of Florida for the limited purpose of attempting to reconstruct and/or complete the record in the above case for appellate purposes. Since the case was tried to a jury with the undersigned United States District Judge presiding, the case was remanded to the Chief Judge of the Middle District of Florida, the Honorable William Terrell Hodges, for appropriate as-

signment, "either to Judge Hoffman or otherwise" (See Appendix X attached). The Court of Appeals attached, as Appendix A, a list of the apparent missing items of the transcribed proceedings, together with some contended missing exhibits.

By order entered on January 17, 1989 (See Appendix Y attached), the Honorable W. Terrell Hodges, Chief Judge of the United States District Court for the Middle District of Florida, assigned said limited remand to the undersigned.

By order entered on January 23, 1989, the undersigned convened a hearing, scheduling same for Friday, February 24, 1989 at 9:30 a.m., at the United States Courthouse in Orlando, Florida. It so happens that the undersigned had previously received a designation to sit in the Middle District of Florida from January 23, 1989 to and including February 24, 1989. The Court allowed a reasonable period of time for all interested parties to respond and be prepared for such hearing (See Appendix Z attached).

Written responses were filed by all defendants or *their present* counsel.[1] The Court states "their present counsel" as there have been some changes since the Court imposed sen-

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[1] Victor E. Murgo responded through his now appellate attorney, Jake Arbes. Both Mr. Murgo and Mr. Arbes were present at the hearing. Joseph A. Rosier represented Mr. Murgo during all trial proceedings in the district court, including sentencing, but Mr. Arbes also stated his representation of Murgo during the post-trial and sentencing stage of the proceedings. Mr. Rosier has never asked leave to be substituted by Mr. Arbes, but it was apparent at sentencing that Mr. Arbes was assuming the role of lead counsel for Murgo, and Mr. Arbes alone filed the notice of appeal in Murgo's behalf.

tences on February 23, 1985.[2] Counsel for the Government have also changed, although Donald E. Christopher and Stephen D. Milbrath, both of whom were trial counsel, have now been designated as Special Assistant United States Attorneys for a least this limited remand proceeding.

The crux of our present problem is that, during this lengthy criminal trial, counsel for the Government and occa-

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[2] In addition to Victor E. Murgo, the defendant, Joseph La Spesa, was represented at all trial stages, including sentencing, by Elmo R. Hoffman, an attorney practicing in Orlando, Florida. La Spesa's present counsel is Allen Melton of Dallas, Texas. Mr. Melton initially appeared for La Spesa at the start of this prolonged case. Only for reasons stated in 2(B) of Appendix Z did the Court permit Mr. Melton to withdraw. After La Spesa had been sentenced, the Court did enter an order permitting Elmo R. Hoffman to withdraw from the case. Mr. Melton then reappeared, filed the notice of appeal, and now complains that he is not familiar with the record of the case.

Stephen A. Sarault was represented during all stages of the trial by James N. Turner of Orlando, Florida, who was appointed to represent Stephen A. Sarault under the CJA and was compensated accordingly. Following the sentencing, Mr. Turner requested leave to withdraw from the case and, without objection by Stephen A. Sarault who was practicing law in Rhode Island and had an admitted income of at least $25,000, an order was entered permitting the withdrawal. Like Mr. Rosier and Mr. Elmo R. Hoffman, Mr. Turner also appeared at the hearing on February 24, 1989. Stephen A. Sarault is appearing *pro se* for appellate purposes. Sarault did not appear at the hearing.

Aime J. Sarault, the father of Stephen A. Sarault, was similarly represented under the CJA by Mr. J. William Masters, II, during all trial stages and also on the appellate level. Mr. Masters filed a response for Aime J. Sarault and was present at the hearing.

James J. Cally appeared *pro se* during all trial proceedings. He claims to be an attorney practicing in New York City. He is appearing *pro se* on the appellate level. While Cally filed a written response to the Court's order of January 23, 1989, he did *not* appear at the hearing on February 24, 1989 as directed by the Court.

sionally for one or more of the defendants, would order a transcript of the testimony of one or more witnesses. The orders were placed directly with the court reporters and the transcripts or excerpts therefrom, when completed, were delivered by the court reporter to the attorney having ordered same, with copies, if any, to such attorney having requested a copy. Nothing was filed with the clerk at that time, and the court reporting firms failed to keep any accurate records of what transcripts, or portions thereof, had been delivered and to whom. Of course, a bill for the transcript was sent to the attorney, and this occasionally, but not always, referred to the witness or excerpt of his or her testimony.

By practice, understanding, or otherwise, the Orlando Division of this Court has apparently never insisted upon compliance with the "free copy" rule of 28 U.S.C. § 753(f), nor with other provisions of § 753, although the present practice may have corrected this problem since this case was tried. It may be assumed that the Orlando Division is not alone in disregarding compliance with the "free copy" rule; the reasons being lack of storage space in the Clerk's office and pressure from court reporters who wish to save money by not providing the "free copy." The difficulty is that the parties and their counsel have no desire to have transcripts, or portions thereof, prepared at a double expense. For example, Mr. Arbes, when he ordered the transcript in behalf of Murgo, ordered "all" transcripts "that have not already been transcribed." This order was dated March 10, 1985. The question is, where there is no required compliance with § 753, who can tell what needs to be transcribed to complete the record on appeal? Assuredly, it is not the fault of the attorney ordering the transcript as he would only be aware of a transcript of excerpt which he had previously received

and, moreover, he could properly assume that there would be compliance with § 753. The Clerk is probably partially at fault in not instructing the various court reporters that they must comply but, where "official" reporters generally report all cases, the Clerk knows that an official reporter will probably comply and, if so, the reporter could always advise the Clerk what may be missing. The trouble lies in the so-called "contract reporter"; made doubly difficult in this case where the Government contract with the Libby Lester Reporting Services concluded on February 19, 1983, and the successor contractor was not as competently administered and reliance upon outside, independent reporters was required.

While the remand Court is not familiar with the specific terms of the then existing contracts with the two court reporter contracting firms serving the Middle District of Florida in Orlando, this Court has examined the standard form Government contract (AO 358) which was last revised prior to this 1983 trial in August 1981. The Director of the Administrative Office of the United States Courts executes these contracts in behalf of the Government. The contractor is the individual reporter, or representative of a court reporting firm, who performs the court reporting and transcription services at contractual rates. The contract contains essentially all of the requirements of 28 U.S.C. § 753, including paragraph 11(a), (b), (c), and (d), providing that the title to the reporter's notes shall vest in the Government as soon as they are created, which corresponds to the second paragraph of 28 U.S.C. § 753(b). The third and fourth paragraphs of § 753 provide for transcripts to be prepared and delivered to a party or judge requesting same and, when delivered, the reporter "shall promptly deliver to the clerk for the records of the court a certified copy of any

transcript so made." Section 753(f) authorizes the charging and collecting of fees for transcripts requested by the parties at rates prescribed by the court subject to the approval of the Judicial Conference, and then follows:

> He shall not charge a fee for any copy of a transcript delivered to the clerk for the records of court.

Under the second paragraph of § 753(b), the Clerk is required to maintain the reporter's notes, after being received from the reporter, for not less than ten years. This presents storage problems for a clerk when substantial work is done by contract reporters. With an official reporter the storage space is not a great problem as the office of the reporter may be designated as the place of storage, but contract reporters, with varying periods of employment with any local firm, cannot be expected to have any designated place of storage other than with the Clerk. In any event, in the present controversy there were never any reporter's notes deposited with the Clerk;[3] there were never any free transcripts provided; and, lastly, there were essentially no records as to whom transcripts had been previously delivered.

Finally, § 753(g) makes express provision for contract reporters and the reporters, in executing the contract so au-

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[3] The standard contract existing in 1983 provided, under paragraph 11(c), for depositing with the Clerk (designated as Record Custodian) the notes of any recordings involving no requests for transcripts, within 90 days after conclusion of the proceedings, or within 90 days of the expiration of the contract, whichever first occurs. The Savings Provisions of Pub. L. 97-164 enacted April 2, 1982 do not affect this case. A one-year period was provided for experimentation with electronic sound equipment which is not applicable to this proceeding.

thorized, automatically come within the terms of the Court Reporter Act, 28 U.S.C. § 753, as part-time reporters.

The foregoing affords no relief to the present situation. Examining Appendix A, attached to Appendix X, the hearing on February 24, 1989 was directed primarily to Appendix A. The Government had previously filed an encouraging response (See Appendix X-1 attached), from which it will be noted that several additional transcripts were located after Special Agent John Richardson of the F.B.I. was called back to assist in hunting for the missing items.[4] Taking the items shown by the Court of Appeals in Appendix A, each item will be numbered and discussed.

ITEM 1

Testimony of Joseph Beaulieu

It is true that there is an omission of a very few pages from the initial testimony of Joseph Beaulieu which should have appeared in ROA 24 of 108, at page 22, where the court reporter, Vickie L. Bluemanauer, noted that Beaulieu was called as a witness and the reporter wrote "Previously Transcribed)". Of course, when the court reporter made up

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[4] Counsel for one or more of the defendants appears to be extremely critical of the Government's failure to come forward with the additional transcripts at the time a prior remand was directed in this case in the summer of 1986. At that time the Government was represented by an Assistant United States Attorney who had married the young lady running the successor contractor, and it was obvious that this young lady had not completed her transcripts. Moreover, the government had presumably paid for the original of these transcripts now recently located by Agent Richardson and the primary burden of supplying the completed transcript must rest upon the party appealing the case. Rule 10(b), Fed. R. App. P.

that transcript it was on July 23, 1985—more than two years after the trial. The error is understandable as, in the interim, several volumes of Beaulieu's testimony had been transcribed.

At ROA 24 of 108, page 30 (same volume as above), it appears that the prosecutor was given leave to question Beaulieu *in the absence of the jury*. This interrogation refers to his prior omitted testimony given earlier that same afternoon (January 12, 1983) when Beaulieu testified that he thought that his "interviews with the FBI had been tape-recorded." The Court now recalls that when this matter came up at the time his testimony was previously given (but not transcribed), the Court became concerned as it apparently was an incorrect statement on the part of Beaulieu.[5] However, such a statement under oath raises questions in the mind of any judge; it would affect the obligation to provide transcripts of tape-recordings; it would be Jencks Act material; it could possibly subject Beaulieu to a charge of perjury. At the time of that initial hearing, Beaulieu did not have his attorney present. The Court now recalls that the

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[5] Beaulieu initially pled not guilty on July 19, 1982. He was represented by court-appointed counsel in the person of Charles A. Tabscott. On November 4, 1982, the case was transferred to Judge George C. Young. On November 19, 1982, Beaulieu changed his plea of not guilty as to Count One, and entered a plea of guilty to that Count only. On November 29, 1982, Judge Young imposed a five-year probationary sentence with supervision. Counts 2, 3, 4 and 5 were dismissed as to Beaulieu only. A transcript of Beaulieu's change of plea hearing on November 19, 1982, and prepared and filed in a separate file containing Beaulieu's case on February 22, 1983, was necessary because Murgo's counsel was quite properly demanding this as Jencks Act material [Transcript is now a transcript transferred to this case]. The change of plea hearing did not disclose any discussion of tape-recorded interrogations by agents of the FBI, each of whom denied that there was any tape-recording.

Court stopped Beaulieu's testimony and told him to discuss the matter with his lawyer. Later, in the afternoon when Beaulieu testified in the absence of the jury, a court-appointed attorney, Charles Scott, appeared with Beaulieu. In the final analysis, the evidence failed to reveal any suggestion of tape-recorded interviews.

It is believed that the "Government's Summary of Testimony of Joseph Beaulieu on January 12, 1983" filed as Ex. No. 1 at the hearing on February 24, 1989, is reasonably accurate, although it perhaps covers a wider area than what took place when the Court stopped his testimony. Since essentially everything testified to by Beaulieu at this first session was thereafter covered in detail by his references to individual cases involving victims of the scheme to defraud, the Court does not believe that the missing brief transcript is of any significance.

There is a further reason for having stopped Beaulieu's testimony. In ROA 12 of 108, p. 303, there is a reference to an order entered on February 3, 1983 with respect to Beaulieu and two other witnesses, Jos. Francis Attonito and Christopher Uzzi, who had previously pled guilty before District Judge George C. Young. At those times, each witness (then a defendant) had made statements in open court which were subject to disclosure, and counsel for the defendants on trial before Judge Hoffman and a jury were insisting upon their right to examine this testimony before cross-examining these individuals. A portion of the order directing the payment of transcripts by the United States said, in part:

> Government having called as a witness the said Joseph J. Beaulieu whose testimony was interrupted . . .

Since all of Beaulieu's testimony on January 12, 1983 was in absence of the jury and was, in any event, related to the recordation of his interviews and/or his prior testimony before Judge Young on his plea of guilty which transcript had not been prepared, the remand Court finds no significance to this omission.

ITEM 2

Testimony of Alex Feinman

The hearing on February 24, 1989, discloses that the testimony of this witness, Alex Feinman, on January 17, 1983, was either transcribed, or otherwise cannot now be located. In the view of the undersigned, it was never transcribed and, in effect, Libby Lester Reporting Services, Inc., missed this item of testimony when Attorney Arbes, now representing Murgo, placed his order for "all testimony . . . not heretofore transcribed." In ROA 29 of 108, at page 82, the court reporter, Karen Clark, refers to the testimony of Alex Feinman as "has been previously transcribed." There is no record reflecting by whom Feinman's testimony was ordered to be transcribed, or to whom any transcript may have been delivered. The nature of his testimony, that of a many-times convicted felon, would not impress anyone as being of importance.

Only the Government has submitted summaries of testimony given by witnesses for whom no transcripts can now be found. The defendants merely take the position that they are prejudiced by the omissions, and, with respect to Murgo

and La Spesa, it is contented that their counsel were retained only for appellate purposes and, therefore, cannot prepare a summary of what a witness may have testified at the trial level.[6]

The contentions of present counsel for Murgo (Mr. Arbes) and La Spesa (Mr. Melton), are not as simple as they contend. Mr. Arbes entered the case shortly after that trial court reversed its position as to its prior ruling in the Rule 29(c) motion, which was in the fall of 1984. He attended, together with Mr. Rosier, the sentencing hearing on February 23, 1985.[7] Mr. Joseph Rosier, trial attorney for Murgo, never requested leave to withdraw as counsel for Murgo and the Court was never advised that he had been replaced by Mr. Arbes, until the hearing on February 24, 1989, although the Court had noted that Murgo's notice of appeal was signed only by Mr. Arbes and that Mr. Arbes had taken the leading role in representing Mr. Murgo. It was

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[6] As to Feinman, a telephone call to Garrett Fox, attorney for Sidney Gerhardt, on May 3, 1989, reveals that Mr. Fox recalls that his client, Gerhardt, may have ordered Feinman's testimony transcribed. Gerhardt, although convicted, was subsequently, on the motion of the Government, granted a new trial and the prosecution as to Gerhardt was dismissed. Mr. Fox has assured the Court that, if a transcript of Feinman's testimony is available, it will be surrendered to the Clerk in Orlando for transmittal to the Court of Appeals.

[7] The delays between the time the Court concluded to reconsider its prior ruling on the Rule 29(c) motion were due to two major factors: (1) the long delay in securing transcripts of the pertinent witnesses relating to the issue of multiple conspiracies against a single conspiracy, and (2) the unsuccessful efforts of the defendants to prohibit the court from proceeding to sentence the defendants including proceedings in the United States Supreme Court and the United States Court of Appeals for the Eleventh Circuit.

not until the hearing of February 24, 1989, that the Court was advised as to any differences between Murgo and Rosier or between Arbes and Rosier. The differences arise by reason of a lack of understanding as to the value of Rosier's legal services rendered to Murgo.

In any event, Rosier was present at the hearing on February 24, 1989, and testified, without contradiction, that he had never been contacted by Arbes or Murgo to go over any trial notes and attempt to reconstruct any of the missing portions of the record on appeal. Arbes's contention that the existing controversy between Rosier and Murgo could not possibly assist in reconstructing the record is frivolous. The purpose of reconstructing the record is not to be partial to one side or the other; it is solely to assist the appellate court.

There is even less ground for asserting the argument of change of counsel in La Spesa's case. On the first day of trial, January 10, 1983, Elmo R. Hoffman, an Orlando attorney, noted his appearance for La Spesa, stating that La Spesa's attorney was Allen Melton of Dallas, Texas, and that he, Hoffman, had just been brought into the case "yesterday," January 9, 1983. (See ROA 19 of 108, Vol. I). On January 13, 1983 (See ROA 26 of 108), Mr. Hoffman attempted to withdraw from the case as Melton had returned to Orlando on January 12, 1983. At first the Court was inclined to relieve Mr. Hoffman but La Spesa, when questioned by the Court (See ROA 26 of 108, at page 18-19), stated his willingness to go on with Mr. Melton and, if La Spesa found him to be not capable, "we will replace him immediately." The Court replied to La Spesa (p. 19):

> [I]f you should be convicted, I want you to know that this record would indicate that you have

> urged me to release a very capable lawyer whom I offered to order to continue to serve to represent you and that it is your risk and your responsibility that you are assuming to go on with Mr. Allen Melton, do you understand this?

At page 27, Melton said:

> Judge, I, at this time, do not know whether I will have to testify. I do not know.

Consistent with the practice of the undersigned judge to prohibit an attorney from testifying, the Court then advised Mr. Hoffman that he would have to remain as counsel.

On January 31, 1983, the Clerk's minutes show that "Atty. Melton is absent with La Spesa's approval." On February 2, 1983, Melton was marked "present" but was granted leave to withdraw. At some point in time between January 12, 1983 and February 2, 1983, arrangements were made to pay Elmo R. Hoffman for his services, and he thereafter continued as counsel for La Spesa until after La Spesa was sentenced. He then was granted leave to withdraw as counsel, and Allen Melton signed the notice of appeal for La Spesa.

Mr. Hoffman was present at the hearing on February 4, 1989. He testified and it is clear that he sent all exhibits not introduced into evidence to Mr. Melton. He has expressed his willingness to cooperate with Mr. Melton in reconstructing the record, but Melton indicated that he had not read the record.

An examination of the cases entitled *United States v. Selva*, 546 F. 2d 1173 (5th Cir. 1977), and *United States v. Selva*, 559 F. 2d 1303 (5th Cir. 1977), literally present a *per se*

rule for reversal whenever a defendant is represented on appeal by new counsel, but footnote 5 at 559 F.2d 1306 would appear to discount a *per se* ruling. Certainly the burden is on the appealing defendant to cause the record on appeal to be prepared and presented to the Clerk of the District Court. When a party orders "all" transcripts "that have not already been transcribed," upon whom should the burden rest for determining what transcripts have been transcribed and where they are now located?

Although the Judicial Conference of the United States has required court reporters to retain their notes for a period of ten (10) years in all cases, and such a provision is required by 28 U.S.C. § 753(b), the contract reporters have presumably never been advised of this requirement. In any event, both court reporter firms now report that their notes were destroyed after five (5) years.

The Government has submitted a summarization of the testimony of Alex Feinman (same being Ex. No. 5 at hearing of February 24, 1989). It is believed to be a very accurate account of Feinman's testimony. It is primarily designed to reach Gerhardt (a defendant whose case was ultimately dismissed on motion of the Government), but it also could have affected Murgo's operations as he and Gerhardt were working in close cooperation with one another. In effect, Feinman was, in fact, the insurance companies whose fake names were used in the scheme to defraud.

ITEMS 3 AND 4

Testimony of James Roberts

It is quite correct that a transcript of the testimony of James R. Roberts on January 31, 1983 was not included in the ROA. It is one of several volumes found by Special Agent Richardson after he was requested to lend assistance in reconstructing the record. The same is true as to the proceedings on Tuesday, February 1, 1983, which volume has also now been located by Agent Richardson. The witness, Roberts, was excused at the last page (page 149) of the proceedings of February 1, 1983.

This clarifies and removes Items 3 and 4 as noted by the Appendix attached to the order of the Court of Appeals remanding this case. As to the fault, it now appears that, when this case was previously remanded, whoever had charge of the case in the office of the United States Attorney did not exert any effort to locate the missing transcripts.

ITEM 5

Proceedings of February 9, 1983—Testimony of Rottmeyer and Kfoury

On the caption sheet of the court reporter, Libby Lester Reporting Services, ROA 77 of 108, reflects that the transcript is for proceedings held on "Wednesday, February 19, 1983." Turning to the index and the first page of testimony (p. 4), it clearly states that the proceedings are for February 9, 1983. The first witness for that day was Frances E. Rottmeyer. The direct examination of Paul Kfoury started that same afternoon and was concluded in ROA 55 of 108 (proceedings of February 10, 1983).

This concludes this item. The fault lies with the incorrect date placed on the caption sheet by the court reporter (Libby Lester Reporting Service).

ITEM 6

The excerpt of the testimony of Rex Baker contained in ROA 64 of 108 is included within Baker's testimony reported in ROA 63 of 108, at page 104, line 6, through ROA 63 of 108, at page 111, line 19.

The identity of the person ordering the excerpt is unknown; nor is it known how and why it found its way into the Clerk's Office. It is not a precise copy of ROA 63 of 108 as the Court notes that the excerpt is ROA 63 of 108 at page 3, line 12 refers to "Mr. Christopher," whereas ROA 64 of 108 at 110, line 11, omitted the "Mr." before "Christopher." The Court ordered the transcript of Rex Baker in July 1983, when it decided to reconsider its Rule 29(c) ruling, and ROA 63 of 108 indicates several corrections in ink by the Court, including the omission of "Mr." on page 110 as the Court was positive that it never referred to counsel without using the "Mr."

Stated otherwise, ROA 64 of 108 is completely unnecessary and is repetitive. Similarly, ROA 65 of 108 contains the cross-examination by Elmo R. Hoffman, counsel for La Spesa, of Michael A. Kay. This same testimony is included in ROA 63 of 108, at page 41, line 13 through ROA 63 of 108, at page 48, line 9.

Thus, ROA 65 of 108 is repetitive and may be destroyed but, of course, it is returned to the appellate court for such verification and modification as it desires. These two ex-

cerpts were ordered on February 22, 1983 and an unknown date in March 1983. The Rex Baker testimony, which was included in a volume also containing the testimony of *Norman N. Kay* was ordered by the Court in July 1983.

The Court of Appeals Appendix calls attention to the omission of the early portion of direct examination of the witness, *Michael Anthony Samuel Kay*. This earlier direct examination was on February 14, 1983 and is set forth in ROA 60 of 108, commencing at page 4.

While the prosecutor, Mr. Christopher, expresses the belief that he interrupted the direct examination of Kay for the purpose of accommodating certain witnesses who testified after Kay but before Kay returned for further direct examination, that does not necessarily follow. ROA 60 of 108 contains a portion of Kay's direct testimony with a notation that court adjourned at 5:30 p.m. ROA 63 of 108 at page 3, reflects that the direct examination of Kay was resumed on February 15, 1983 and ended at page 18. The cross-examination, redirect and recross examination terminated at page 69 of ROA 63 of 108.

The only problem is an error in the spelling of Kay's name as "Norman N. Kay" appearing in the index of ROA 63 of 108. This is obviously an error of the court reporter which may be disregarded.

The Court of Appeals correctly notes the absence of the testimony of Richard Donais who apparently testified just after Kay had completed his testimony. The name "Donais" does not appear in the transcripts as having testified, but the Clerk's minutes for February 15, 1983 reflect that he testified as a Government witness, was examined by Mr. Milbrath

and cross-examined by Mr. Hoffman representing La Spesa. At the hearing on February 24, 1989, no party or attorney could identify anyone by the name of Donais except that Mr. Hoffman had a vague recollection of the name. There can be no reconstruction of his testimony, if he in fact testified. It is highly unlikely that Donais could have been a material witness if no one recalls him. Once again, the lack of any system in the offices of the court reporters makes it impossible to obtain verbatim transcripts. It may be, as indicated on page 54 of the transcript of the hearing on February 24, 1989, that Donais was the "con" artist which the Government brought from a federal prison to qualify as an "expert," but the Court rejected his "expert" testimony.

ITEM 7

The Omitted Testimony of Elaine Bradley

Elaine Bradley testified on February 18, 1983, as a custodial witness from the Barnett Bank. Her testimony was never transcribed, again through the inefficiency or lack of a system in Libby Lester Reporting Service.

A summary of Bradley's testimony was submitted by the Government as Ex. No. 2 at the hearing on February 24, 1989. It is correct in the view of the Court. She was cross-examined very briefly by Mr. Rosier, counsel for Murgo.

The exhibits identified by Bradley are in evidence. The contention that the testimony of this witness is significant is utterly frivolous.

ITEMS 8 AND 9

The Beaulieu-Bartel Transcripts

(Note—ROA 86 of 108 is a record of a hearing on a reduction of bond on *Saturday*, February 23, 1985. It has no revelence to the direct appeal in this case. The date of *Saturday*, February 23, 1983 may be incorrect as the next volume, ROA 87 of 108, refers to February 24, 1983 which was a Thursday).

This item pertains to what purports to be a missing excerpt of the testimony of the witness, Joseph Beaulieu.

On Saturday, February 26, 1983, Beaulieu was on the witness stand but, before even being asked to identify himself, he was excused (See ROA 88 of 108, at page 8). Thereafter, it was decided to present other witnesses and, on page 13, there appears the following:

> MR. MILBREATH: That's what we'll do. I'll withdraw Mr. Beaulieu from the stand and put him back on March 7th, I guess it is , when we reconvene.

Later (page 14), it was explained to the jury that Beaulieu would be presented "a week from Monday."[8]

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[8] Some explanation is due for the gap between February 26, 1983 and March 7, 1983. The presiding judge conducts seminars for newly-nominated federal judges and one such seminar had been arranged for the week beginning February 28, 1983. As the presiding judge had been assured that this case would only take five weeks, the judge thought that there could be no possible conflict. When the judge realized that the case could not be concluded by February 28, 1983, it was then too late to cancel the seminar. Hence the delay in the trial.

Beaulieu's testimony given on Monday March 7, 1983, has now been located by Special Agent Richardson and is being made available.

There is some confusion as to the Bartell testimony taken on February 26, 1983. It is transcribed at length in ROA of 108, beginning at page 15, and ending at page 108. The confusion arose because of duplicate transcripts.

ITEM 10

The Beaulieu Transcript

The missing transcript of the testimony of Joseph Beaulieu has now been located. See discussion under Items 8 and 9.

ITEM 11

The Herbert Williams Transcript

This item involves the missing transcripts of an original codefendent, Herbert Williams, who testified in his own behalf on March 14, 1983. The Court directed a verdict of not guilty on Counts I and II as to this defendant. The jury returned a verdict of not guilty as to Count III. With reference to Counts IV and V, the matter of this defendant's guilt or innocence was left to the jury, but the jury did not agree. Thereafter, the Government moved to dismiss as to Williams.

In all probability, when the court reporters were requested to transcribe all testimony, except that which had previously been transcribed, the court reporter (Karen Van Nuis Calvacca) concluded that the testimony of Herbert Williams was unnecessary because he was no longer in-

volved in the case. Obviously, when this case was remanded in 1986, with no hearings ordered and only the Clerk in charge, the omission of the testimony of Herbert Williams was never called to her attention. At the time Calvacca still had her notes—now the notes are gone.

The Government has filed a brief summary of Williams' testimony. He had worked for Murgo for about one year when the fraudulent scheme collapsed. The Court did not believe that there was sufficient testimony to involve him as a member of any overall conspiracy as alleged in Counts I and II. The so-called Temple conspiracy, separately alleged, involved only Murgo among the appealing parties. The summary prepared by the Government is correct, insofar as it goes, but it does not purport to be an accurate presentation of the testimony of Williams.

This is one place in which the affected defendant, Murgo, could have assisted in reconstructing the record. Not only was this the testimony of a former employee, but Mr. Murgo spent many hours in the office of the Clerk examining all files. This ruling applies also to reconstructing the very brief omitted testimony of Joseph Beaulieu, a two and one-half year Murgo employee, which was interrupted on January 12, 1983. While no defendant may be required to testify by way of self-incrimination, reconstructing a record as to what others may have already said does not fall within the protected category.

As to Counts IV and V, this Court cannot make a finding that the testimony of Herbert Williams was not critical, although it highly unlikely that the jury verdict as to Murgo

would have been different on these Counts.[9] If the appellate court agrees, this Court would recommend that the judgment and sentence as to Victor E. Murgo, on Counts IV and V only, be reversed and that Murgo be awarded a new trial on Counts IV and V, because of the failure to transcribe the testimony of Herbert Williams given on March 14, 1983.

ITEM 12

Sarault Testimony—Govt. Ex. 697

The Court of Appeals Appendix refers to March 16, 1983 with an inference that *only* the conclusion of the cross-examination of Stephen A. Sarault (also referred to as Steven A. Sarault) was filed (See first Supp., Vol. 5). Actually ROA, 1st Supp., Vol. 5, contains the entire direct and cross-examination of Sarault, most of which was reported on March 14, 1983, and part of which was reported on March 15, 1983 (See ROA, 1st Supp., Vol. 5, page 90). The March 15, 1983 session terminated at 5:10 p.m. (See p. 285). No separate index for March 15-16 was prepared by the court reporter. There was an index at the start of ROA, 1st Supp., Vol. 5, at pp. 2a and 2b, and it would appear to the remand Court that this shows Exhibits marked and received for March 14-15-16.

The Court of Appeals Appendix questions Govt. Ex. 697 which was numbered for identification on March 16, 1983 according to the Appendix. The remand Court is unable to locate this particular exhibit as having even been numbered for identification on that date. The Clerk's min-

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[9] The cross-examination of Beaulieu on March 8, 1983 (See First Supp., Vol. 4, pp. 5-111), especially by Jones, the attorney for Herbert Williams, rather adequately demonstrates the nature of Williams's later testimony.

utes do not reflect that any exhibits were numbered or admitted on March 16, 1983, but the Clerk's minutes are not, of course, controlling. The transcript does not refer to it.

An examination of the boxes will reveal what has been *marked for identification* as Govt. Ex. No. 697, same being a report of Chemtec Corporation, prepared for Joseph La Spesa, entitled "Report on Placer and Lode Mineral Claims, Randsberg Mining District, Kern County, California." The Clerk's slip attached to this exhibit does not reflect that it was ever presented as evidence, although it may have been received in evidence when the video-deposition of Dr. Donald R. Davies of Henderson, Nevada, was submitted and exhibited to the Jury. Since the entry of the remand order the Clerk has located numerous deposition exhibits in connection with Dr. Davies, among which is Defendant/La Spesa Ex. No 1 which is the same report as Ex. 697, and which was also marked only "for identification."[10]

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[10] The Clerk found other matters in connection with the Dr. Davies deposition which should have been forwarded to the appellate court. This consists of two tape recordings of the video-deposition; a court reporter's transcript of 186 pages which is not complete and not certified (the transcript was not received as evidence as the tape recordings were displayed and these are in evidence); Govt. Ex. 2 through 7 and Govt. Ex. 13 through 18, and 18, 19. Also contained with the exhibits, but not marked by anyone as an exhibit will be found what purports to be a letter dated December 14, 1976 from Dr. Davies and a Mr. Sweet to La Spesa, and what appears to be a recorded document entitled "Lode Mining Claim Location Notice," dated November 21, 1980, with an attached diagram showing the site of the claim.

The remand Court is instructing the Clerk to forward these items to the appellate court even though the last two mentioned exhibits have never been marked. The Court has not replayed the tapes (although they present an interesting scene), but there has been much contention by Mr. Melton (La Spesa's present counsel) that some exhibits may be missing.

In any event, Ex. No 697 cannot be considered as evidence unless offered and received. While the remand Court is returning Ex. No. 697 to the proper exhibit box, it is probably an inadvertent error on the part of Clerk in forwarding same to the Court of Appeals unless, perhaps, it had been offered and refused.

ITEMS 13 AND 14

On March 16, 1983, the Clerk's minutes show that the jury was excused until Monday, March 21, 1983. The defendant, La Spesa, caused the depositon of Dr. Davies to be videotaped in Henderson, Nevada, on Saturday, February 5, 1983 and Tuesday, February 8, 1983 (ROA 12 of 108, p. 351), but the transcript was apparently never completed. It may be that the entry of the date of March 18, 1983, by the Clerk was a compliance with the Court's direction to file a witness list. However, except by videotape-deposition, Dr. Davies never appeared as a witness in the case.

While the trial judge and counsel have no distinct recollection as to the date, all of us vividly recall that one of the regular jurors reported to the Clerk early one morning that, it is believed, his brother and the brother's entire family, living in West Virginia, were murdered, and that he felt compelled to attend the funeral services. After some discussion with counsel, and ascertaining that the juror wished to continue to serve if possible, as the evidence was substantially completed, counsel, the parties, and the Court agreed to recess the case until the following Monday. While still not certain as to the precise date, it is the view of most counsel and the Court that this "break" in the trial ran from March 16, 1983, at about 12:30 p.m. until the regular morning resuming time on Monday, March 21, 1983. Of course, in the

interim the Court was able to complete its work on the jury charge.

According to the Clerk's minutes of March 21, 1983, the jury trial resumed from March 18, 1983. This may have been an error by the courtroom deputy clerk, or she may have seen the entry of March 18, 1983, referring to "Dr. Davies and possibly other witnesses." In any event, there was no jury trial of this case on March 18, 1983.

Testimony was presented to the jury on March 21, 1983 and March 22, 1983. Other than the video deposition of Dr. Davies, in behalf of La Spesa, only Gerhardt presented evidence on March 21, 1983. The Government started its rebuttal at 4:05 p.m. on March 21, 1983. The Court recessed at 4:28 p.m. The Government continued its rebuttal testimony on March 22, 1983 and concluded at 3:25 p.m. The defendant, Herbert Williams, then elected to take the stand by way of surrebuttal and, at 3:57 p.m., all parties rested. The jury was excused at 4:05 p.m., following which post-evidentiary motions were made and denied.

On March 23, 1983, counsel, in part, made their closing arguments. These arguments were partially concluded on March 24, 1983, and finally concluded on March 25, 1983. The Court thereafter charged the jury and the jury commenced its deliberations on March 25, 1983 at 3:25 p.m.

The excerpt of the Court's charge to the jury (consisting of only 6 1/2 pages) was sent to the Court of Appeals for appellate purposes in ROA 98 of 108. It was certified by Jean M. Carolan, a reporter who enjoys an excellent reputation as to her competency. If this was the trial's judge's *full* and *complete* charge, there is obvious error. The trial judge

cannot account for what happened as the charge had been duplicated and made available to all counsel, the jury, and the courtroom deputy clerk. The copy of the charge was delivered to the jury after the Court orally delivered same.

Although the contract reporters all claim to have destroyed their stenographic notes, this rule has apparently not applied to Ms. Carolan. Under date of January 26, 1989, Ms. Carolan certified a transcript containing the charge, the length of which was initially 48 pages (pp. 2 to 50). The exceptions to the court's charge consisted mainly in reincorporating the charge conference comments which now appear to be transcribed. Supplementary comments were made to the jury (pp. 56-57), in response to two questions propounded by the jury (See Exhibit No. 9).

The foregoing removes Item 14 from the Appendix. It is difficult to believe the ease by which a federal trial judge can be reversed simply because a court reporter has not checked as to what she certified.

ITEM 15

March 30, 1983—The Jury Verdict

Following the recess of the jury deliberations on March 25, 1983 (apparently a Friday), the jury was directed to and did return on Monday, March 28, 1983.

The trial judge had advised counsel and the jury that he would be leaving Orlando on Monday, March 28, 1983, at about 3:00 p.m., to attend a judicial meeting in California. He requested that, if there were any questions from the jury, they should be submitted by noon on Monday, March 28. Other than the two questions submitted and answered on

March 25, 1983, no further questions were presented to the trial judge.

The trial judge had arranged for the Honorable George C. Young, Senior United States District Judge, to receive the verdict. In discussing the matter with Judge Young since the latest remand order was entered, it can only be said that Judge Young remembers receiving the verdict and setting dates in the future, but he has no recollection of any communication between the court and jury, other than the customary proceedings relating to a jury poll, if requested, etc.

Whoever prepared the Appendix for the Appellate court examined carefully the court exhibits which contain the notes sent by the jury to the judge. There were, indeed, five notes sent to the judge on March 30, 1983, which was the day the jury returned its verdict. They are summarized as follows:

> (1) The jury wanted the use of a tape recorder to play portions of Exhibits 632a, 632b, 633, 634 or 635.
>
> While there are purported transcriptions of the tape recordings of the conversations between Timothy Temple and Murgo or Beaulieu, only the tapes were received in evidence. The transcriptions were given to the jury while the tapes were played, but unanimous agreement could not be reached as to the accuracy of the transcriptions.
>
> At the hearing on February 24, 1989, the recollection of some counsel is that Judge Young declined to permit the playing of the tapes, and no exception was taken by any party or their counsel.

(2) The jury made inquiry as to a clarification of Count III of the indictment as related to Rex Baker travelling between Union, Ohio and Orlando, Florida.

At the hearing on February 24, 1989, counsel did not mention this question. However, since the verdict on Count III was "not guiltity," it makes no difference as to what Judge Young may have responded.

(3) The jury sent a note to Judge Young advising that the jurors were taking a luncheon break between 12:15 and 1:30 p.m., and that nine of the twelve jurors planned to leave the jury room, while three jurors had their lunches and would remain in the jury room.

This was not essentially a question; it was more like a report. The jury was not sequestered. It cannot now be determined whether Judge Young responded and, if so, what he said.

(4) Another note to Judge Young said:

"We the jury have reviewed again the available evidence and discussed with an open mind the 4 issues which remain open and cannot accommodate a unanimous decision."

According to the hearing of February 24, 1989, Judge Young must have responded to this inquiry. Mr. Masters, attorney for Aime Sarault, seems to recall substantially what took place (TR. 90) as he was called back from attending another trial and stated that everyone agreed on the response." While Mr. Hoffman, former attorney for La Spesa said, "it had some similarities to a shotgun charge, go back

there and get together," no one suggests that Judge Young gave an Allen or modified Allen charge.

While the jury did retire and consider the matter further, it is obvious from the next and last note that no minds were changed. One thing is clear—whatever Judge Young may have said in responding to the question, there was no objection asserted by any party.

Special Agent Richardson has some recollection that the reporter was a lady named Gilda Gillis. Ms. Calvacca, the contractor responsible for the transcript, has stated to the Special Assistant United States Attorney that "she has been unable to locate Ms. Gillis."

The Government has filed a brief summary of testimony indicating that there were four notes from the jury to the judge. The final note—the fifth received—merely advised Judge Young that they had agreed on all except four issues and, as to these four issues, they disagreed.

The verdict of the jury is in the Clerk's file and, while it is always appropriate to record any comment between the jury and the judge, it does not fall into any *per se* rule that there must be a reversal merely because of the absence of a transcript. In the view of the remand Court the omission is not critical in this case and no attorney will state that any objection was previously made.

ADDITIONAL ISSUES RAISED AT POST-REMAND HEARING

(1) Mr. Arbes, now representing Murgo, has called other matters to the attention of the Court.

He complains that Govt. Ex. No. 103, having an impact upon Murgo, is missing. Apparently Mr. Arbes never looked in the six boxes of exhibits. The remand Court found it without difficulty. Ex. No. 103 was marked, offered and admitted on March 10, 1983. It is a CREDIT Memo, dated 11-19-79, crediting Account No. 11100; and reads as a description:

> to Exchange Bank of Tampa, Osceola Br., Kissiminee, Fla. 530-3069901. Murgo & Sandborn Asso. Escrow Acct. from R. L. Ayers & Co., Inc., Fl.

There are some figures in the box marked "Total," but the figures are essentially illegible because of machine numbers inserted over them.

(2) Mr. Arbes, counsel for Murgo, now contends that the cross-examination of Special Agent Jack Brennan's testimony is missing (TR. 93-94), and that the reference in ROA 24 of 108, at page 22, indicating that Brennan's testimony had been previously transcribed was partially in error. In ROA 25 of 108, at page 8, the direct examination of Special Agent Brennan commenced. Cross-examinations by defense counsel Rosier (p. 73), Masters (p. 80), Dvorak (for Mancini, p. 82), Hoffman (p. 87), Fox (for Gerhardt, p. 91), and recross by Hoffman (p. 113) and Rosier (p. 116) are shown in ROA 25 of 108. At page 120, the following appears:

> THE COURT: All right, we resolved that important question.
>
> Do we have any other questions now of Agent Brennan?

All right. Thank you. Mr. Brennan. You may step down.

The certification of the court reporter for ROA 25 of 108 is dated January 21, 1983—shortly after the witness testified. The certification of the same reporter on ROA 24 of 108, at page 22 where he states that Brennan's testimony has been "previously transcribed" is dated July 23, 1985.

The remand Court is certain that Mr. Arbes, who has worked diligently on this case since he became co-counsel with Rosier after the Court made its ruling to reconsider its prior action on the Rule 29(c) motion, will concede that he is in error as to these two points raised by him at the hearing on February 24, 1989. In fairness to Mr. Arbes, he apparently was drawing his conclusions as to Govt. Ex. No. 103 from an exhibit list which does not indicate that Ex. No. 103 was admitted. However, the Exhibit No. 103 was clearly admitted, and errors on the part of a Clerk may be anticipated in a protracted trial with more than 500 exhibits.

(3) The Court of Appeals raised the question that certain La Spesa exhibits, identified at the taking of the video deposition of Dr. Davies, were not in the appellate record. That is a correct statement. These exhibits, referred to in the deposition, were marked by counsel (Hoffman for La Spesa and Milbrath for the government), but the record does not reflect that they were ever offered in evidence. The trial court assumed that they were admitted by agreement. In any event, the Clerk has now found a file containing the La Spesa deposition exhibits and this file is being forwarded to the appellate court.

Present counsel for La Spesa, Mr. Allen Melton of Dallas, Texas, concedes that he has not read, nor attempted to read, the record. La Spesa's trial attorney, Elmo R. Hoffman, has been thoroughly cooperative at the hearing on February 24, 1989. Mr. Melton asserted (TR. 112) the La Spesa Exhibits 1 though 4, 6, 7, 9, 10, 12 through 23, 26, 26a, 26(b), 26(c) were not available (TR. 113-114).

There is a local rule in the Middle District of Florida (See Rule 5.04) which directs that, in jury cases, the exhibits shall be kept by the Clerk *until a verdict is rendered in a jury case* or until the entry of a final order by the Court in a non-jury case. The responsibility is imposed upon counsel to maintain all exhibits during the time the appeal is pending. Whether any exhibits were returned to counsel in this case is unknown. Local Rule 5.04 does place a definite responsibility upon counsel in any case, and the trial judge in this case would never endorse the return of exhibits in a criminal case, at least until there has been exhaustion of the direct appeal route.

Elmo R. Hoffman, the trial attorney for La Spesa, was called as a witness for the Government at the hearing on February 24, 1989 (TR. 147-173). After the remand orders were entered in January 1989, Mr. Melton contacted Mr. Hoffman. Mr. Hoffman located some boxes containing folders and documents which had been marked as exhibits and Mr. Hoffman numbered them and sent them to Mr. Melton. Mr. Hoffman does not know whether any of these recently located exhibits were offered in evidence. If any exhibit was offered, Mr. Hoffman does not recall whether it was admitted (TR. 150). Mr. Hoffman agreed that no one, including Mr. Milton, had ever attempted to reconstruct the docu-

ments that were entered as exhibits in the case. Mr. Milbrath, representing the Government, exhibited to Mr. Hoffman a number of exhibits introduced and admitted at the request of the Government, which Milbrath contends are exhibits Melton now claims are missing. Mr. Hoffman identified several of these exhibits but they were copies retained by the Government and he was not prepared to state whether they had been marked or admitted.

On cross-examination by Mr. Melton (TR. 161—173), Mr. Hoffman was requested to identify certain numbered exhibits which were not presented by Mr. Melton for any other purpose.

On examination by Agent Richardson as to any exhibits affecting La Spesa, the witness relates Govt. Ex. No. 7 with La Spesa Ex. No. 1 (TR. 175; 177); Govt. Ex. No. 8 corresponds to La Spesa Ex. No. 4 as numbered on the exhibit list, and which had been provided to defendants in pretrial discovery; Govt. Ex. No. 9 is the same as La Spesa Ex. No. 6; Govt. Ex. No. 10 relates to La Spesa Ex. No. 7, or perhaps La Spesa Ex. No. 6 (TR. 179); Govt. Ex. No. 11 appears to be the same as La Spesa Ex. No. 10; Govt. Ex. No. 12 corresponds to La Spesa Ex. No. 14; Govt. Ex. No. 13 ties with La Spesa Ex. No. 15; Govt. Ex. No. 14 is a copy of La Spesa Ex. No. 19; Govt. Ex. No. 15 is related to La Spesa Ex. No. 20; Govt. Ex. No. 16 is the same as La Spesa Ex. No. 21; Govt. Ex. No. 17 is the same as La Spesa Ex. No. 22; Govt. Ex. 18 corresponds to La Spesa Ex. No. 23.

The confusion as to marking exhibits is that counsel for La Spesa, when required to supply a list of exhibits, used his own numbering system, whereas the Government had adopted the marking as finally adopted during the trial. The

Government's copies of exhibits as related above are marked and received for the purpose of attempting to clarify the matter concerning the La Spesa exhibits. Too much reliance on exhibit lists has created most of the confusion.

(4) The Court of Appeals has noted that Steven Sarault's Ex. No. 7 is missing. It is true that it is not included in the Stephen Sarault (or Steven Sarault) packet containing his exhibits. Mr. Milbrath, for the Government, claims that there is an erroneous reference to Sarault Ex. No. 7 (TR. 121). He contends that this occurred during the cross-examination of the witness, Herberick (ROA 61 of 108 at page 52), when Mr. Turner refers to an exhibit marked for identification as "Steve Sarault's Number 6." After the document was tendered to the witness, Mr. Turner, conducting the cross-examination, referred the witness to Number 8a. There is, indeed, an Article 8a contained in Steven Sarault Ex. No. 6. However, Mr. Milbrath argues that the notes of the witness were probably marked as Sarault No. 7 as the No. 8a in Steven Sarault Ex. No. 6 is not related to the admitted Steven Sarault Ex. No. 6. The remand Court cannot make such a finding and Steven Sarault Ex. No. 7 is either missing, or it was never marked for identification or offered in evidence. In short, there is no explanation of what Ex. No. 7 purports to show. While it is marked on the exhibit list as being admitted, but not marked as identified, it contains no description of Sarault Ex. No. 7.

(5) The Court of Appeals intimates that other Government exhibits may be missing but it is suggested that Govt. Ex. 522aaa, 550, and 551 can be reconstructed and, if this has not been done, the attorneys for the Government will arrange to do so. As a matter of fact, Govt. Ex. 551 is

quoted verbatim, in part, in this Court's Memorandum, p. 29, dated August 20, 1984. Govt. Ex. 701 was a large status board which was seized in Murgo's office following the issuance of a search warrant where Murgo caused the status of his projects to be displayed. Ex. 701 cannot now be located and it was probably returned to counsel following the trial or otherwise destroyed by the Clerk under the authority of the Local Rule. However, it is abundantly clear that the absence of this exhibit could have nothing to do with the issues to be decided.

With regard to the applicable law, the rule in the *Selva* cases, decided by the Fifth Circuit, has not been consistent in later cases. In *Untied States v. Stefan*, 784 F.2d 1093, 1102 (11th Cir. 1986), *cert. denied*, _____ U.S. _____, 107 S. Ct. 650, the Court noted that "Some disagreement exists, however, as to how much of the record may be omitted before reversal is mandated" and rejected appellant's request for a new trial based on omissions in the record of a long and complex trial, finding that the omissions were not substantial and significant.

Absent any showing of intentional falsification or plain unreasonableness, this remand Court realizes that its determinations in reconstructing the record are conclusive. *United States v. Mori*, 444 F.2d 240, 246 (5th Cir. 1971), *cert. denied*, 404 U.S. 913. The first test under *Selva*, requiring a showing of specific prejudice to obtain a reversal, is not of great consequence because the co-counsel or substituted counsel for Murgo, and the reentry of Melton as counsel for La Spesa, did not adversely affect the rights of these appellants as both former trial counsel stood ready and willing to cooperate in reconstructing the record for appellate pur-

poses. The correct test in this case is whether the omissions were substantial and significant. Only with respect to the omitted transcripts of the testimony of the codefendant, Williams, does the remand Court find any substantial and significant omission, and this is limited to Murgo and the so-called Timothy Temple conspiracy which was completely separate from all other defendants/appellants. While the evidence against Murgo as to his guilt with reference to the Temple charges was overwhelming, the remand Court finds it difficult to conclude "affirmatively that no substantial rights of the appellant [Murgo] have been adversely affected." This would require the remand Court to surmise that Williams's testimony at trial had no effect upon Murgo's guilt. This finding the remand Court cannot make, and therefore reluctantly certifies to the United States Court of Appeals that a new trial be granted to Murgo confined solely to Counts IV and V of the indictment.

CONCLUSION

From the foregoing review of the present status of the record on appeal (as the same may now be supplemented as a result of the hearing of February 24, 1989), the Court is of the opinion that with the exception of the testimony of the codefendant, Williams, no substantial and significant portion of the record is now missing or otherwise unaccounted for, and that a new trial should not be ordered under the circumstances. There is no showing of specific prejudice and, even if we accept the principle that a change in attorneys from the trial to the appellate level eliminates the necessity of showing prejudice or error, *United States v. Selva*, 554 F.2d 1303, 1305-06 (5th Cir. 1977), there is no indication that a new trial will assist in the final disposition of this case.

Assuming that a new trial is ordered, if the Government elects to retry the defendants, the issue of double jeopardy will be raised in proceedings prior to the next trial. In the district court's memorandum, dated August 20, 1984, there is a complete review of the Jurisdiction and Double Jeopardy problem which is, in the opinion of the undersigned, the controlling issue for the determination of this case (see pages 10-30 of memorandum). It analyzes the multiple conspiracy situation which caused the district court's erroneous ruling of May 11, 1983, on the Rule 29(c) motion for judgment of acquittal. In the final analysis, it presents this question:

> Since the United States is given the statutory right to timely appeal an adverse ruling on the granting of a Rule 29(c) motion for judgment of acquittal, after a jury verdict of guilty, with a possible reversal and reinstatement of the jury verdict of guilty, does the district court have jurisdiction to entertain and decide a timely motion by the United States to reconsider its prior erroneous ruling on a Rule 29(c) motion without affecting the double jeopardy rights of a defendant?

It is submitted that the condition of the transcripts and exhibits will have nothing to do with the resolution of the foregoing question. If that question is to be resolved in favor of the defendants, that is the end of the case. If that question is to be resolved in favor of the United States, the record as now presented is substantially complete and there are no substantial and significant portions of the record which are missing.

United States v. Healy, 376 U.S. 75, 77-78 (1964), answers the question as to the rehearing or reconsideration by a

district court of a prior erroneous ruling. After the district court dismissed an indictment, the Government, within thirty (30) days, filed a petition for rehearing which the district court denied about three (3) weeks later. The Government then filed a notice of appeal under 18 U.S.C. § 3731 permitting a direct appeal. In reversing the district court (where only direct appeals to the Supreme court were allowed), the Supreme Court, speaking through Justice Harlan, said:

> The question, therefore, is simply whether in a criminal case a timely petition for rehearing by the Government filed within the permissible time for appeal renders the judgment not final for purposes of appeal until the court disposes of the petition—in other words whether in such circumstances the 30-day period prescribed by Rule 11(2) begins to run from the date of entry of judgment or the denial of the petition for rehearing.

Holding that "criminal judgments are nonfinal for purposes of appeal so long as timely rehearing petitions are pending," it is obvious that the double jeopardy clause did not come into play in this case. *Id.* at 78.

Healy was reaffirmed in *United States v. Dieter*, 429 U.S. 6 (1976). In *Dieter*, a motion to suppress was initially denied. Following a later case by the Supreme Court and two subsequent Tenth Circuit cases holding that the Supreme Court decision should be applied retroactively, the district court reconsidered Dieter's motion to suppress and dismissed the indictment on October 14, 1974. The Government filed a motion on October 16, 1974, which the Supreme Court later construed as a "petition for rehearing," although not captioned as such. On November 6, 1974, the district court de-

nied the motion holding that it had "no authority or jurisdiction" to set aside the order. On November 7, 1974, the Government filed its notice of appeal which, by that time, was directed to the Court of Appeals. The Tenth Circuit dismissed the appeal as untimely, holding that the notice of appeal had not been filed within the 30-day limitation period of 18 U.S.C. § 3731. The Supreme Court reversed the Court of Appeals, holding, *id.* at 8:

> The fact that appeals are now routed to the courts of appeals does not affect the wisdom of giving district courts the opportunity to correct their own alleged errors, and we must likewise be wary of imposing added and unnecessary burdens on the court of appeals. These considerations fully apply whether the issue presented on appeal is termed one of fact or of law, and the Court of Appeals law/fact distinction—assuming such a distinction can be clearly drawn for these purposes—finds no support in Healy.

As in the instant case, it is clear, therefore, that the timely filing of a motion for reconsideration permitted the district court to correct its errors, whether of fact or law, and that the finality of the order of May 11, 1983 granting the motions for judgment of acquittal under Rule 29(c), Fed.R. Crim. P., never came into operation because of the district court's action in reversing itself.

As to whether the Government had the right to appeal from an adverse ruling on a motion for judgment of acquittal, this issue is controlled by the recent case of *United States v. Greer*, 850 F.2d 1447 (11th Cir. 1988), where the rights under the double jeopardy clause of the Constitution were considered.

From these authorities, the remand Court is extremely doubtful as to whether any double jeopardy issue is at issue, but the arguments present an interesting question.

All of which is respectfully submitted.

/s/ Walter E. Hoffman
Senior United States District Judge

At Norfolk, Virginia
July 28th, 1989.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
Orlando, Division

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.	)	CASE NO. 82-67-CR-ORL-Y
	)	
JAMES J. CALLY,	)	
JOSEPH LA SPESA,	)	On Limited Remand
VICTOR E. MURGO,	)	From United States
STEVEN A. SARAULT,	)	Court of Appeals for
AIME J. SARAULT,	)	The Eleventh Circuit
	)	in No. 85-3131
	)	
Defendants-Appellants.	)	

ORDER ON LIMITED REMAND

The Report on Limited Remand in the above case having this day been docketed and filed in the Orlando Division of this Court, and the transcript of the proceedings on said limited remand conducted on February 24, 1989, having been heretofore filed on March 20, 1989, it is

ORDERED that said Report and transcript, together with all exhibits, transcripts and other records and files, including such documents, exhibits and transcripts as may have been introduced and/or supplied at the hearing on February 24, 1989, be held by the Clerk in Orlando for a period of twenty (20) days to permit the parties and/or their attorneys to examine any and all records, exhibits and tran-

scripts that may pertain to this case, but such examination shall be under the supervision of the Clerk or one of his deputies.

At the expiration of said period of twenty (20) days, the Clerk will ship, transport, or cause to be transported, the Report on Limited Remand, together with all exhibits, transcripts and records above mentioned, to the Clerk of the United States Court of Appeals, 56 Forsyth Street, N.W., Atlanta, Georgia 30303, for such further proceedings as may be required.

Copies of this order and the Report on Limited Remand with appendices have this day been mailed by the undersigned to the following attorneys: (1) Manuel Hernandez, Assistant United States Attorney, 80 N. Hughey Avenue, Orlando, Florida 32801; (2) Jake Arbes, Esquire, Attorney at Law, 233 Mitchell Street, Atlanta, Georgia 30303; (3) Allen Melton, Esquire, Attorney at Law, 1509 Main Street, Suite 703, Dallas, Texas 75201; (4) J. William Masters, II, Esquire, Attorney at Law 1500 S. Semoran Boulevard, Orlando, Florida 32807; (5) Joseph A. Rosier, Esquire, Attorney at Law, 559 South Country Club Road, Lake Mary, Florida 32746; and to the following *pro se* defendants who are appellants herein: (6) James J. Cally, Esquire, Attorney at Law, 150 Broadway, Suite 1002-03, New York, New York 10038; (7) Stephen A. Sarault, 617 Pine Street, Apt. 6, Central Falls, Rhode Island 02863; and to (8) Miguel J. Cortez, Jr., Esquire, Clerk, United States Court of Appeals, 56 Forsyth Street, N.W., Atlanta, Georgia 30303; and to the Honorable Wm. Terrell Hodges, Chief Judges, United States District Court, United States Courthouse, Suite 108, Tampa, Florida 33602.

Not forwarded to the foregoing is a copy of the transcript of the limited remand hearing on February 24, 1989, as the same was provided at Government expense and interested parties were invited to order a copy from the court reporter, if one was desired.

If not heretofore paid by the Clerk, it is **ORDERED** that the court reporter in attendance at the limited remand hearing on February 24, 1989, be compensated for her services in accordance with the contractual rate then prevailing; said amount to include the cost of transcribing the original of said proceedings with the court reporter providing the statutory free copy as provided by 18 U.S.C. § 753.

/s/ Walter E. Hoffman
Senior United States District Judge

At Norfolk, Virginia
July 31st, 1989.